Supreme Court, U.S.
FILED

No. 01 1040 JAN 10 2002

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

TO-RO TRADE SHOWS, d/b/a
O'LOUGHLIN TRADE SHOWS,

*Petitioner,*

v.

GRANT COLLINS and KATHY BARROSFRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON, and ROBERT SMITH,

*Respondents.*

**On Petition For Discretionary Review To The Washington State Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

MANN, JOHNSON, WOOSTER
& MCLAUGHLIN, P.S.
RICHARD H. WOOSTER
WSBA #13752
*Counsel of Record*
820 A Street, Suite 550
Tacoma, WA 98402
(253) 572-4161
*Attorneys for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

143 pp

## ISSUES PRESENTED FOR REVIEW

1. Whether a trade show promoter has standing under the First Amendment to challenge State administrative action closing a trade show exhibit at the promoter's show?

2. Whether a trade show promoter is entitled to due process protection before a trade show exhibit is ordered by State agents to be closed, locked and vacated?

3. Whether a blanket ban on product display at trade shows by recreational vehicle dealers lacking an in-State dealer's license at an interstate trade show violates the First Amendment?

4. Whether a blanket ban on out-of-state dealers advertising their products and services in the medium of an interstate trade show violates the equal protection rights of the show promoter when out-of-state dealers are permitted to advertise within Washington state using the media of newspapers, radio and television?

5. Whether State administrative agents ordering a trade show display of recreational vehicles closed, locked and vacated under the threat of: "I could take out my gun and shoot you" are entitled to qualified immunity?

6. Whether trade show promoter may recover damages pursuant to 42 U.S.C. § 1983 for a closure of one third of an interstate trade show which violates the trade show promoter's First Amendment, Due Process and/or Equal Protection Rights?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties are listed in the caption of the case. There is no parent corporation or publicly held company owning 10% or more of the To-Ro Trade Shows' stock.

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF AUTHORITIES ..... v

CITATIONS TO OFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY ADMINISTRATIVE AGENCIES ..... 1

JURISDICTION ..... 1

a. Date of Entry of Order Reviewed ..... 1

b. Statutory Authority to confer United States Supreme Court jurisdiction to review on a write of certiorari the judgment or order in question ..... 1

c. Rule 29.4(b) & (c) Notices Regarding Unconstitutional Statute ..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE ..... 2

a. United States Constitutional Provisions ..... 2

b. Federal Statutes ..... 3

c. Washington State Statutes ..... 3

I. STATEMENT OF THE CASE ..... 10

A. General Statement of the Case ..... 10

1. Factual Background ..... 10

2. Procedural Background ..... 12

II. LEGAL ARGUMENT ..... 14

TABLE OF CONTENTS – Continued

Page

A. The Washington Supreme Court's Determination Denying Trade Show Promoter Standing To Challenge Governmental Actions Taken Against Promoter's Exhibitors Conflicts With A Long Line Of First Amendment Cases ..... 14

B. A Trade Show Is Conduct Protected By The First Amendment ..... 17

C. A Trade Show Promoter Is Entitled To Due Process Protection When An Exhibiter At Promoter's Trade Show Is Ordered Closed, Locked And Vacated By Show Agents ..... 21

D. The Court Erred In Finding That The Individual Defendants Were Entitled To Qualified Immunity ..... 23

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

*44 Liquormart et al. v. Rhode Island*, 517 U.S. 484, 134 L.Ed.2d 711, 116 S.Ct. 1495 (1996) ..... 18

*American Fire Theft Inclusion Managers, Inc. v. Gillespie*, 932 F.2d 816 (9th Cir. 1991)..... 25

*Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 527 (1987)..... 23

*Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)..... 21

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)..... 21

*Bd. of Trustees of State Univ. of N.Y. v Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)..... 14, 18, 24

*Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed. 2d 394 (1985)..... 15

*California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278 (9th Cir. 1974)..... 21

*Carlin Communications v. FCC*, 837 F.2d 546 (9th Cir. 1988) ..... 15

*Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)..... 21

*Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)..... 18

*Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)..... 20

*Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984)..... 15, 25

TABLE OF AUTHORITIES – Continued

Page

*Capoeman v. Reed*, 754 F.2d 1512 (9th Cir. 1995) .... 24

*Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).....18, 20

*Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)..... 15

*Friedman v. Rogers*, 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887 (1979)..... 20

*Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 227, 73 L.Ed.2d 396 (1982).....24, 25

*IOTA Sigma Chi v. George Mason University*, 993 F.2d 386 (4th Cir. 1993)..... 18

*LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000)....15, 16

*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....22, 25

*McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)..... 15

*Merit v. Mackie*, 827 F.2d 1368 (9th Cir. 1987)..... 17

*Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985) ..... 24

*Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ..... 21

*Project 80's Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991) ..... 17

*Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) ..... 16

TABLE OF AUTHORITIES – Continued

Page

*Sable Communications v. F.C.C.*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)..... 24

*Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989)..... 21

*Virginia Pharmacy Board v. Virginia Citizen Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).....18, 19

*Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)18 ..... 18

*Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed.2d 210 (1928)..... 22

*West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1989)..... 17

STATE CASES

*Brower v. Wells*, 103 Wn.2d 96, 690 P.2d 1144 (1984)..... 16

*Gurno v. Town of La'Conner*, 65 Wash.App. 218, 828 P.2d 49, *review denied*, 119 Wn.2d 1019 (1992).... 24

*Sound Garden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1990)..... 22

*To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 27 P.3d 1149 (2001).....1, 14

*Vovos v. Grant*, 87 Wash.2d 697, 555 P.2d 1343 (1976)..... 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. I. . . . . 2

U.S. Const. amend. XIV. . . . . 2

STATUTES

RCW 7.24 *et seq.* . . . . . 14

RCW 46.70.005. . . . . 13

RCW 46.70.021. . . . . 3, 12, 13, 16

RCW 46.70.023. . . . . 5, 16

FEDERAL STATUTES

28 U.S.C. § 1257(a) . . . . . 1

42 U.S.C. § 1983 . . . . . 3, 14, 16, 17, 23

RULES

Sup. Ct. R. 29.4(b) . . . . . 2

Sup. Ct. R. 29.4(c) . . . . . 2

## CITATIONS TO OFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY ADMINISTRATIVE AGENCIES.

*To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 27 P.3d 1149 (2001);

*To-Ro Trade Shows v. Collins*, 141 Wash.2d 1024, 11 P.3d 825 (Table) (2000);

*To-Ro Trade Shows v. Collins*, 100 Wash.App. 483, 997 P.2d 960 (2000).

## JURISDICTION

**a. Date of Entry of Order Reviewed.**

This petition for certiorari seeks review of the August 2, 2001 Opinion of Washington State Supreme Court, rehearing was denied October 18, 2001.

**b. Statutory Authority to confer United States Supreme Court jurisdiction to review on a writ of certiorari the judgment or order in question.**

This is an appeal pursuant to 28 U.S.C. § 1257(a) seeking review of a final judgment rendered by the highest court of the State of Washington regarding interpretation of a statute is repugnant to the Constitution and rights, privileges or immunities are claimed under the Constitution by Petitioner.

**c. Rule 29.4(b) & (c) Notices Regarding Unconstitutional Statute.**

Rule 29.4(b) does not apply as no federal statute is involved. Rule 29.4(c) does not apply because an agency of the State of Washington and employees of that State agency are parties.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

**a. United States Constitutional Provisions.**

**i. First Amendment. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**ii. Fourteenth Amendment. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**b. Federal Statutes**

**i. 42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**c. Washington State Statutes**

**i. Wash. Rev. Code 46.70.021 Licenses Required for dealers or manufacturers – Penalties.**

It is unlawful for any person, firm, or association to act as a vehicle dealer or vehicle manufacturer, to engage in business as such, serve in the capacity of such, advertise himself, herself, or themselves as such, solicit sales as such, or distribute or transfer vehicles for

resale in this state, without first obtaining and holding a current license as provided in this chapter, unless the title of the vehicle is in the name of the seller. It is unlawful for any person other than a licensed vehicle dealer to display a vehicle for sale unless the registered owner or legal owner is the displayer or holds a notarized power of attorney. A person or firm engaged in buying and offering for sale, or buying and selling five or more vehicles in a twelve-month period, or in any other way engaged in dealer activity without holding a vehicle dealer license, is guilty of a gross misdemeanor, and upon conviction is subject to a fine of up to five thousand dollars for each violation and up to one year in jail. A second offense is a class C felony punishable under chapter 9A.20 RCW. A violation of this section is also a per se violation of chapter 19.86 RCW and is considered a deceptive practice. The department of licensing, the Washington state patrol, the attorney general's office, and the department of revenue shall cooperate in the enforcement of this section. A distributor, factory branch, or factory representative shall not be required to have a vehicle manufacturer license so long as the vehicle manufacturer so represented is properly licensed pursuant to this chapter. Nothing in this chapter prohibits financial institutions from cooperating with vehicle dealers licensed under this

chapter in dealer sales or leases. However, financial institutions shall not broker vehicles and cooperation is limited to organizing, promoting, and financing of such dealer sales or leases.

**ii. Wash. Rev. Code 46.70.023 Place of Business.**

(1) An "established place of business" requires a permanent, enclosed commercial building located within the state of Washington easily accessible at all reasonable times. The business of a vehicle dealer must be lawfully carried on at an established place of business in accordance with the terms of all applicable building code, zoning, and other land-use regulatory ordinances. A vehicle dealer may display a vehicle for sale only at its established place of business, licensed subagency, or temporary subagency site, except at auction. The dealer shall keep the building open to the public so that the public may contact the vehicle dealer or the dealer's salespersons at all reasonable times. The books, records, and files necessary to conduct the business shall be kept and maintained at that place. The established place of business shall display an exterior sign with the business name and nature of the business, such as auto sales, permanently affixed to the land or building, with letters clearly visible to the major avenue of traffic. A room or rooms in a hotel, rooming house, or apartment house building or part of a

single or multiple-unit dwelling house may not be considered an "established place of business" unless the ground floor of such a dwelling is devoted principally to and occupied for commercial purposes and the dealer offices are located on the ground floor. A mobile office or mobile home may be used as an office if it is connected to utilities and is set up in accordance with state law. A state-wide trade association representing manufactured housing dealers shall be permitted to use a manufactured home as an office if the office complies with all other applicable building code, zoning, and other land-use regulatory ordinances. This subsection does not apply to auction companies that do not own vehicle inventory or sell vehicles from an auction yard.

(2) An auction company shall have office facilities within the state. The books, records, and files necessary to conduct the business shall be maintained at the office facilities. All storage facilities for inventory shall be listed with the department, and shall meet local zoning and land use ordinances. An auction company shall maintain a telecommunications system.

(3) Auction companies shall post their vehicle dealer license at each auction where vehicles are offered, and shall provide the department with the

address of the auction at least three days before the auction.

(4) If a dealer maintains a place of business at more than one location or under more than one name in this state, he or she shall designate one location as the principal place of business of the firm, one name as the principal name of the firm, and all other locations or names as subagencies. A subagency license is required for each and every subagency: PROVIDED, That the department may grant an exception to the subagency requirement in the specific instance where a licensed dealer is unable to locate their used vehicle sales facilities adjacent to or at the established place of business. This exception shall be granted and defined under the promulgation of rules consistent with the Administrative Procedure Act.

(5) All vehicle dealers shall maintain ownership or leasehold throughout the license year of the real property from which they do business. The dealer shall provide the department with evidence of ownership or leasehold whenever the ownership changes or the lease is terminated.

(6) A subagency shall comply with all requirements of an established place of business, except that subagency records may be kept at the principal place of business designated by the dealer. Auction companies shall

comply with the requirements in subsection (2) of this section.

(7) A temporary subagency shall meet all local zoning and building codes for the type of merchandising being conducted. The dealer license certificate shall be posted at the location. No other requirements of an established place of business apply to a temporary subagency. Auction companies are not required to obtain a temporary subagency license.

(8) A wholesale vehicle dealer shall have office facilities in a commercial building within this state, and all storage facilities for inventory shall be listed with the department, and shall meet local zoning and land use ordinances. A wholesale vehicle dealer shall maintain a telecommunications system. An exterior sign visible from the nearest street shall identify the business name and the nature of business. When two or more vehicle dealer businesses share a location, all records, office facilities, and inventory, if any, must be physically segregated and clearly identified.

(9) A retail vehicle dealer shall be open during normal business hours, maintain office and display facilities in a commercially zoned location or in a location complying with all applicable building and land use ordinances, and maintain a business telephone listing in the local directory. When two or more

vehicle dealer businesses share a location, all records, office facilities, and inventory shall be physically segregated and clearly identified.

(10) A subagency license is not required for a mobile home dealer to display an on-site display model, a consigned mobile home not relocated from its site, or a repossessed mobile home if sales are handled from a principal place of business or subagency. A mobile home dealer shall identify on-site display models, repossessed mobile homes, and those consigned at their sites with a sign that includes the dealer's name and telephone number.

(11) Every vehicle dealer shall advise the department of the location of each and every place of business of the firm and the name or names under which the firm is doing business at such location or locations. If any name or location is changed, the dealer shall notify the department of such change within ten days. The license issued by the department shall reflect the name and location of the firm and shall be posted in a conspicuous place at that location by the dealer.

(12) A vehicle dealer's license shall upon the death or incapacity of an individual vehicle dealer authorize the personal representative of such dealer, subject to payment of license fees, to continue the business for a period of six

months from the date of the death or incapacity.

## I. STATEMENT OF THE CASE.

### A. General Statement of the Case

#### 1. Factual Background

Under the threat, "I could take out my gun and shoot you" Washington State Department of Licensing (hereinafter WDOL) personnel ordered a trade show display of recreational vehicles closed, locked and vacated. The event was To-Ro Trade Show's 1994 Spokane Spring RV Show at the Interstate Fairgrounds in Spokane, Washington. One third of the show was locked as a result of that WDOL order. Like a crop in a field, that show represented O'Loughlin's entire year's income for the Spokane area.

To-Ro Trade Shows (hereinafter To-Ro) promotes various trade shows throughout the Western United States.[1] The Spokane Spring RV Show was an annual event. Exhibition space was rented to Lake City RV, conducting business in Idaho, thirteen miles across the Washington-Idaho border. Lake City RV did not hold itself out as a Washington dealer, show patrons were directed to its Idaho location to make any purchase. Lake City RV was the only factory authorized Prowler, Savannah, Westport and Avion distributor in the Spokane and Coeur d'Alene area.

---

[1] To-Ro also puts on Boat Shows, Home & Garden Shows, Sportsman's Shows, Home Remodeling and Decorating Shows.

These brands were not available within the State of Washington in the Spokane area. These product lines generate considerable interest, attracting show patrons. To-Ro presents a diverse array of product at its shows. Excluding these brands is like excluding General Motors products from an automobile show.

O'Loughlin's earns revenue from paid gate attendance and leasing space to exhibitors.

Prior to opening the 1994 show, Lake City RV agreed with To-Ro to exhibit its vehicles with signs that indicated that they were for display purposes only and were not for sale; that no sales of its products would occur at the show; and withhold pricing information at the show.

"For Display Only, Not for Sale" signs were posted on the vehicles. WDOL had no knowledge of offers of sale being made at the show.

Late Friday, April 8, 1994, State Inspector Collins and Robert Smith ordered the Lake City RV display to be closed, locked and vacated. This action was taken solely because Lake City RV was not a Washington licensed dealer. Neither Smith or Collins had any knowledge of false or misleading information at the display or other specific harm. Defendants did not consider the Plaintiff's Constitutional rights before taking action to close the exhibit.

No hearing was held, no *ex parte* order was obtained, no emergency cease and desist order was issued by the Director of WDOL. Mr. Collins assumed an enforcement role, under color of law, ordering the exhibit closed, locked and vacated. When his authority was questioned

Mr. Collins indicated that he could: "Take out my gun and shoot you and then it would not be a problem."

Show patrons became upset, vocal when the exhibit was shuttered, some demanding refunds. To-Ro made refunds and reduced its prices. Price reductions dramatically impacted To-Ro's revenue. To-Ro refunded Lake City RV its $4,800.00 rental fee for exhibition space at the show.

Defendants acknowledged it was not unlawful for an unlicenced dealer to advertise in the print media or on television. However, the Department of Licensing regarded the trade show advertising medium unlawful and criminal.

The Courts of Washington State from the Superior Court for Thurston County to the Washington Supreme Court have avoided addressing the issues of this case on the merits and have asserted that a Trade Show Promoter has no standing to assert its own First Amendment rights or rights of show patrons or the trade show exhibitors, and therefore had no due process protection when an exhibit is closed. To-Ro respectfully requests this court accept review of this matter.

### 2. Procedural Background

To-Ro sought damages, an injunction prohibiting an ongoing ban against product exhibits at Trade Shows and sought declaratory relief regarding the scope of R.C.W. 46.70.021 for future shows.

WDOL asserts a blanket ban on trade show display unless the exhibitor holds a Washington dealer's license

and asserted because To-Ro was not a vehicle dealer it lacks standing for any challenge to the conduct. The trial court agreed, dismissing all of the Plaintiff's causes of action. To-Ro appealed to the Washington State Court of Appeals which affirmed. After accepting review, the Washington Supreme Court, over a strong dissent by one justice, held trade show promoters lack sufficient interest to seek review of the statute or the enforcement action against To-Ro's exhibitor:

> To-Ro asserts that RCW 46.70.021 violates its First Amendment rights by prohibiting it from allowing unlicenced dealers to display their vehicles at its trade shows. But plainly, To-Ro's interest in seeking declaratory relief lies outside the zone of interests regulated by RCW 46.70.021. The purpose of the dealer licensing statute is to protect the public from "frauds, impositions, and other abuses" by vehicle dealers. RCW 46.70.005. To-Ro is not a vehicle dealer, licensed or otherwise, nor is it acting in a representative capacity for any organization of consumers or vehicle dealers. *See* ***Vovos v. Grant***, 87 Wash.2d 697, 700, 555 P.2d 1343 (1976) (interest sufficient to confer standing may be shown in personal or representative capacity). The interest To-Ro is seeking to protect is its own theoretical interest in increasing the number of exhibitors participating in its trade shows. To-Ro's potential financial interest as a show promoter clearly does not coincide with the statute's aim of protecting consumers from fraudulent or abusive conduct by vehicle dealers. We must conclude that, because To-Ro is not within the zone of interests regulated in RCW 46.70.021, it lacks standing to challenge the statute on First Amendment grounds; any

such challenge would belong to the excluded dealer, not To-Ro.

*To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 414-15, 27 P.3d 1149 (2001).

The Washington Supreme Court disposed of the case under the Washington Declaratory Judgments Act, Wash. Rev. Code, 7.24 et seq., without addressing the Constitutionality of the Actions taken or future actions pursuant to 42 U.S.C. § 1983. The Court denied To-Ro's timely motion for rehearing on October 18, 2001.

## II. LEGAL ARGUMENT.

### A. The Washington Supreme Court's Determination Denying Trade Show Promoter Standing to Challenge Governmental Actions Taken Against Promoter's Exhibitors Conflicts With a Long Line of First Amendment Cases.

Trade shows are a medium permitting persons interested in a subject matter to make immediate comparisons of a variety of goods and services at a single venue, together with many persons sharing knowledge and interest in the event's subject matter.

It is clearly established that the First Amendment protects product display and demonstration. ***Bd. of Trustees of State Univ. of N.Y. v. Fox***, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

A show promoter, like bookseller or theater owner, is a type of "clearinghouse" for expression and as a practical matter is in a far better position to vindicate First Amendment rights, ensure public access and thwart

excessive governmental intrusion upon the free exchange of ideas and information than individual show patrons or exhibitors. ***Cinevision Corp. v. City of Burbank***, 745 F.2d 560, 568 (9th Cir. 1984). When the State Agents shut down the display To-Ro Trade Shows, its patrons and exhibitors were stripped of Constitutional protections of the free expression, due process, equal protection and interstate commerce.

If a statute has First Amendment implications, it may be declared invalid to the extent that it reaches too far, but otherwise left intact. ***Brocket v. Spokane Arcades, Inc.***, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). First Amendment over breadth challenge affords a party strong standing to challenge a statute or the enforcement actions of regulators. ***Carlin Communications v. FCC***, 837 F.2d 546 (9th Cir. 1988). Persons impacted by a regulation directed at the behavior of a third party have standing to seek judicial review. Department store employees had standing to challenge "blue laws" mandating Sunday closure of their employer. ***McGowan v. State of Maryland***, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). In ***McGowan***, employees had standing to challenge a regulation that intertwined church and state.

Application for a license is not a prerequisite to challenge licensing requirement under the First Amendment. ***Freedman v. State of Maryland***, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). ***Freedman*** involved a movie house owner's challenge to a licensing statute that delegated overly broad discretion onto administrative officers.

In ***LSO, Ltd. v. Stroh***, 205 F.3d 1146 (9th Cir. 2000), the Court held a trade show producer had standing to

address regulatory actions addressed at persons other than the show promoter. ***LSO*** produced the Erotic Art Exhibition and Trade Show in Palm Springs, California. Officials from the California Department of Alcoholic Beverage Control interfered with the exhibition by threatening regulatory sanctions against licensees' providing the venue for the exhibition if the licensees permitted erotic art to be exhibited on their premises. The Court held that LSO had standing to seek judicial redress for this conduct, even though the government threats were not directed at LSO itself, because the government actions inflicted direct injury on LSO's business as the producer of the show.

A trade shows promoter featuring recreational vehicles at interstate venues is directly affected by R.C.W. 46.70.021 and 46.70.023. In this instance, the State used the statute to order To-Ro's exhibit closed and locked, directly impacting To-Ro, its patrons and the exhibitors.

The Constitution protects citizens against abuse by government actors. Redress is afforded pursuant to 42 U.S.C. § 1983:

> A § 1983 civil rights claim requires: (1) Actions under color of state law; and (2) Defendant's conduct deprived the Plaintiff of a right guaranteed by the United States Constitution. ***Brower v. Wells,*** 103 Wn.2d 96, 106, 690 P.2d 1144 (1984). ***Robinson v. City of Seattle,*** 119 Wn.2d 34, 58, 830 P.2d 318.

A public employee acting in official capacity generally acts under color of state law. "The traditional definition of acting under color of state law requires that the

defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

***West v. Atkins***, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1989).

The State actor need only set in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict Constitutional injury. ***Merit v. Mackie***, 827 F.2d 1368 (9th Cir. 1987).

In this case, WDOL personnel used threats of violence, criminal and civil sanction to shut down an exhibit at To-Ro's exhibition. To-Ro has standing to challenge the lawfulness of such State action and actions which limit the production of future shows.

### B. A Trade Show Is Conduct Protected by the First Amendment.

Determining whether a law violates the First Amendment entails a four-part test. First, determine whether the speech is protected. ***Project 80's, Inc. v. City of Pocatello***, 942 F.2d 635, 637 n.4 (9th Cir. 1991).

> Then, the court must determine, [2] whether the State's interest in proscribing it are substantial; [3] whether the challenged regulation advances these interests in a direct and material way; and [4] whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.

*Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, U.S. 557, 564, 100 S.Ct. 2343, 2689, 65 L.Ed.2d 341 (1980).

Product demonstration is speech. *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Short of obscenity, live entertainment enjoys First Amendment protection. *IOTA Sigma Chi v. George Mason University*, 993 F.2d 386 (4th Cir. 1993).

Commercial speech is protected by the First Amendment. *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993) (citing *Virginia Pharmacy Board*, 425 U.S. at 762, 96 S.Ct. at 1825).

Restrictions of speech must be (1) content neutral, (2) narrowly tailored to serve a significant government interest and (3) leave ample alternatives of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

> The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services. Nevertheless, as we explained in *Linmark*, the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the commercial aspect of [it] – with offerors communicating offers to offerees. (citations omitted.)

*44 Liquormart et al. v. Rhode Island*, 517 U.S. 484, 499, 134 L.Ed.2d 711, 116 S.Ct. 1495, 1506 (1996).

Trade shows are quintessential speech, both entertaining and establishing a forum for exchanging information and direct comparisons on a wide variety of issues, products and services. Printed advertisement, television or radio advertisements cannot compare in their ability to inform the consumer. The presence of the physical product, coupled with the ability to interact regarding particular features cannot be duplicated in any other medium. The ease of making side by side comparisons among competing products educates consumers.

Wash. Rev. Code 46.70.021 actually harms individual and societal interests by restricting an inquisitive consumer's access to product information. See ***Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748, 766, 96 S.Ct. 1817, 1828, 48 L.Ed.2d 346 (1976). The *Virginia* court explained:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

***Virginia Pharmacy Board***, 425 U.S. at 765, 96 S.Ct. at 1827.

In determining whether the statute is narrowly tailored to serve a significant government interest, we look

to the fit between the State's regulation and the stated purpose in making this determination. ***Cincinnati v. Discovery Network, Inc.***, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). In this case the only evidence presented on State interest was a vague reference to "consumer protection." No false information was being communicated.

To-Ro assumes the State seeks to ensure accurate commercial information and to protect consumers. Yet State bears the burden of demonstrating that the harms it seeks to avoid are "real and that its restriction will in fact alleviate them to a material degree." ***Edenfield v. Fane***, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993). Here only the barest sketch of presumed harms were presented. There was no showing how the ban upon product display furthered consumer protection goals.

For the appropriate allocation of resources to occur, the public needs informed consumer choices and this interest is furthered by the recognition that the First Amendment protects advertisements, including pricing. ***Friedman v. Rogers***, 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887 (1979). The very nature of a trade show promoter's business is to present a wide array of products and services in a single forum. Persons attend as patrons and exhibitors from a variety of locations. Restricting exhibitor attendance to only those persons holding a business license in the local jurisdiction thwarts the purpose of a trade show. Show patrons from Idaho were denied the right to view products displayed by dealers from their own state. Washington patrons were denied a complete array of product to view.

### C. A Trade Show Promoter Is Entitled To Due Process Protection When An Exhibitor At Promoter's Trade Show Is Ordered Closed, Locked and Vacated By State Agents.

Due process is fundamentally the opportunity to be heard at a meaningful time and in a meaningful manner. ***Armstrong v. Manzo***, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In ***Carey v. Piphus***, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978), this court recognized that making deprivation of certain absolute rights eligible for nominal damages without proof of actual injury, the importance to organized society that those rights remain scrupulously observed is embraced. This court found that procedural due process was such an "absolute" right.

***Board of Regents of State Colleges v. Roth***, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) reinforced that property interests enjoying procedural due process protection are not restricted to a few rigid technical forms. To-Ro's goodwill was impacted. Goodwill is a "property interest" entitled to protection; and the business owner cannot be deprived of it without due process of law. ***Soranno's Gasco, Inc. v. Morgan***, 874 F.2d 1310 (9th Cir. 1989). A corporate plaintiff can assert rights under the 14th Amendment under § 1983. ***California Diversified Promotions, Inc. v. Musick***, 505 F.2d 278 (9th Cir. 1974).

In ***Mullane v. Central Hanover Bank & Trust Company***, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this court established that procedural due process applies to an adjudicatory administrative proceeding. The right of an owner to devote his land to any legitimate use is

properly within the protection of the Constitution. ***Washington ex rel. Seattle Title Trust Company v. Roberge,*** 278 U.S. 116, 121, 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928). To-Ro leased the Spokane Interstate Fairground and was entitled to put on a display of recreational vehicles, including vehicles exhibited by out-of-state dealers. State Agents' actions implicated To-Ro's due process rights.

Once procedural due process protections apply, some type of pre-deprivation hearing is required unless extraordinary circumstances exist. The formality of the pre-deprivation hearing is determined according to the analysis of the three factors enunciated in ***Mathews v. Eldridge,*** 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures. ***Sound Garden v. Eikenberry,*** 123 Wn.2d 750, 871, P.2d 1050 (1990).

In this case the State action amounted to closing a third of O'Loughlin's Spokane business for the year. The risk that a violation of civil rights would occur is evident from the fact that the display closed. The State chose to ignore established procedures to provide due process.

State action terminated To-Ro's business in Spokane, yet To-Ro has been denied review at every level of state government. Due process denial could not be more complete.

That conduct cannot withstand judicial scrutiny. Taken to this extreme, the State could order an Internet provider to cease carrying product information about

recreation vehicles unless the dealer involved held a Washington Dealer's license. Could the state exclude display of an art by an artist unless maintained a studio in the State of Washington? Could the State preclude a Montana fishing guide from appearing at a sportsman show unless she held a Washington guide's license?

This Court should accept review and address the Constitutionality of the State's action against To-Ro and its exhibitors and patrons.

### D. The Court Erred In Finding That The Individual Defendants Were Entitled To Qualified Immunity.

The doctrine of qualified immunity cannot cloak Mr. Collins and Mr. Smith with immunity from damages. Closing down the display without any due process of law affected substantial rights of To-Ro Trade Shows under the First and Fourteenth Amendments. That conduct is compounded by Collins' threat that he would "take out his gun and shoot them" if they did not comply with his order.

The exact fact pattern need not have been invalidated "but it is to say that in light of preexisting law, the unlawfulness must be apparent." ***Anderson v. Creighton,*** 107 S.Ct. at 3039. The right's contours must be sufficiently clear such that a reasonable official would understand he or she is violating that right. ***Anderson v. Creighton,*** 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 527 (1987).

Qualified immunity under § 1983, requires defendant to show conduct "did not violate clearly established or

statutory or constitutional rights of which a reasonable person would have known." ***Gurno v. Town of La'Conner***, 65 Wash.App. 218, 227, 828 P.2d 49, review denied, 119 Wn.2d 1019, citing ***Harlow v. Fitzgerald***, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Once the affirmative defense of qualified immunity has been raised in a case on a defendant's motion, plaintiff bears the burden of demonstrating the existence "clearly established" constitutional rights. ***Mitchell v. Forsyth***, 472 U.S. at 526, 106 S.Ct. at 2816. The Supreme Court has indicated that a certain degree of predictability is required; contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

The contours of the First Amendment and Due Process were clearly established at the time Mr. Collins and Mr. Smith conspired to order the Lake City R.V. display shut down. In the absence of binding precedent as to whether conduct officials violate clearly established statutory constitutional rights which a reasonable person would have known, a court should look to whatever decisional law is available to ascertain whether a law is "clearly established." ***Capoeman v. Reed***, 754 F.2d 1512 (9th Cir. 1995).

It is clearly established that the First Amendment protects product display and demonstration. ***Bd. of Trustees of State Univ. of N.Y. v. Fox***, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Content based regulations of expression must advance compelling State interest. ***Sable Communications v. F.C.C.***, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Actions that

violate free speech by banning a particular form of expression allow claims for damages. ***Cinevision Corp. v. City of Burbank***, 745 F.2d 560, 568 (9th Cir. 1984). The exclusion of an out-of-state dealer is no different than the City's action of excluding "hard rock" found repugnant in ***Cinevision***. ***Mathews v. Eldridge***, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976) establishes the right to due process before property interests are taken away. Here, State agents closed a substantial part of To-Ro's business without any pre-deprivation hearing.

Qualified immunity is limited solely to actions for money damages. ***American Fire Theft Inclusion Managers, Inc. v. Gillespie***, 932 F.2d 816 (9th Cir. 1991). ***Harlow v. Fitzgerald***, 457 U.S. 800, 806, 102 S.Ct. 227, 2732, 73 L.Ed.2d 396 (1982). Even if qualified immunity insulated the defendants from monetary damages, To-Ro is entitled to address the issues as it relates to its ongoing production of trade shows.

In this instance, both Mr. Collins and Mr. Smith indicated that they did not give any thought to the Plaintiff's First Amendment rights or Due Process rights.

## CONCLUSION

This Court should accept review to address the Constitutional issues raised by WDOL's actions in this instance and the ongoing refusal of Washington's courts to grant standing to a trade show promoters challenge to a blanket ban on exhibitors at a trade show unless such exhibitors hold a Washington State license to sell product, regardless of whether sales occur at the show.

Respectfully Submitted this 10th day of January, 2002.

RICHARD H. WOOSTER
MANN, JOHNSON, WOOSTER & MCLAUGHLIN, P.S.
550 Bank of America Plaza
820 A Street
Tacoma, Washington 98402
(253) 572-4161

No. _____

In The

# Supreme Court of the United States

TO-RO TRADE SHOWS, d/b/a
O'LOUGHLIN TRADE SHOWS,

*Petitioner,*

v.

GRANT COLLINS,
THE STATE OF WASHINGTON, and
ROBERT SMITH,

*Respondents.*

**On Petition For Discretionary Review To The Washington State Supreme Court**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

1. **Appendix**


a. Opinions, Orders, Findings of Fact, and Conclusions of Law, and manner of entry on Orders entered in conjunction with the judgment.

   i. Washington Supreme Court Opinion, August 2, 2001.....App. 1

   ii. Washington Supreme Court Order Granting Petition for Review, October 11, 2000.....App. 27

   iii. Washington Court of Appeals, Division II Opinion, April 21, 2000..... App. 28

b. Other relevant Opinions, orders, findings of fact, and conclusions of law entered in the case necessary to ascertain the grounds of the judgment.

   i. Washington Superior Court Order on Motion for Summary Judgment of Declaratory Relief Regarding RCW 46.70 as Applied to Trade Show Displays, February 21, 1997.....App. 44

   ii. Washington Superior Court Opinion Regarding Motion For Directed Verdict, March 9, 1998.....App. 48

c. Any order on rehearing.

   i. Washington Supreme Court Order Denying Motion for Reconsideration. October 18, 2001..... App. 81

d. Material Required by Rule 14.1(f) & (g)(i).

   i. United States Constitutional Provisions.....App. 83

(1) First Amendment..... App. 83

(2) Due Process Clause, Fourteenth Amendment..... App. 83

(3) Equal Protection..... App. 83

ii. Federal Statutes

(1) 42 U.S.C. § 1983..... App. 84

iii. Washington State Statutes

(1) Wash. Rev. Code 46.70.021 Licenses Required for dealers or manufacturers – Penalties..... App. 84

(2) Wash. Rev. Code 46.70.023 Place of Business..... App. 86

iv. Manner in which issue was raised below:

(1) Complaint..... App. 91

(2) Notice of Appeal..... App. 104

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS, Petitioner, v. GRANT COLLINS and KATHY BARROSFRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON, and ROBERT SMITH, and JOHN DOES 1 Through 5, Respondents. | No. 69753-1<br>En Banc<br>(Filed Aug. 2, 2001) |

OWENS, J. – We must decide whether a producer of recreational-vehicle (RV) trade shows presented a justiciable controversy under Washington's Uniform Declaratory Judgments Act (chapter 7.24 RCW) (the Act). To-Ro Trade Shows (To-Ro) brought a declaratory judgment action against the State after the Department of Licensing (DOL) enforced the dealer licensing statute (RCW 46.70.021) at To-Ro's 1994 Spokane RV show. To-Ro contended that the State's closure of that portion of its show dedicated to an unlicensed RV dealer violated To-Ro's rights under the Commerce Clause and the First and Fourteenth Amendments to the United States Constitution. The trial court dismissed To-Ro's claims, and the

Court of Appeals affirmed, concluding that, because To-Ro had failed to "demonstrate a direct and certain financial impact" arising from the State's enforcement of the licensing statute, To-Ro lacked standing to pursue declaratory relief. *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 493, 997 P.2d 960 (2000). We agree and hold that To-Ro could not maintain an action for declaratory relief because it failed to present an actual, immediate dispute in which it had a direct, substantial interest. We affirm the Court of Appeals.

## FACTS

To-Ro produces a variety of consumer trade shows, including RV, boat, home and garden, and sportsman shows. To-Ro secures a site for an event, rents space to exhibitors, and charges admission to the public. To-Ro scheduled an RV show for April 7-10, 1994, at the Interstate Fairgrounds in Spokane. When a number of dealers in the local RV association decided not to rent space at the show, To-Ro invited an RV dealer from Coeur d'Alene, Idaho, to participate. Aware that the dealer, Lake City RV, was licensed to conduct business in Idaho but not in Washington, To-Ro's Robert O'Loughlin spoke with Grant Collins, a DOL investigator. Collins told O'Loughlin that a license was required and that the dealer should not participate without one. O'Loughlin then contacted DOL supervisors in Tacoma and Spokane, who also confirmed that an out-of-state dealer was required to have a Washington license in order to participate.

Before the event opened, DOL received an anonymous tip that an unlicensed dealership had brought its vehicles to the fairgrounds. Collins went to the fairgrounds and gave Douglas Foster, Lake City RV's sales manager, written notice that his dealership's participation would be unlawful. On Friday, the second day of the show, Collins returned to find that Lake City RV was indeed participating in the show. At a meeting in O'Loughlin's office, O'Loughlin tried to persuade Collins that Lake City RV could participate as long as it placed "For Display Only" signs on its vehicles, posted no prices, and sold no vehicles, but after checking with his superiors, Collins reiterated that a license was required for Lake City RV to participate.[1] While at the show on Friday, Collins observed that Lake City RV did not have any restrictive "For Display Only" signs on the vehicles. Lake City RV had posted manufacturer's suggested retail prices on its vehicles, as well as handwritten signs reading "show special" or "show prices." Report of Proceedings (RP) at 358-60. Collins asked Lake City RV to close and lock its vehicles, and Lake City RV complied. After the Lake City RV exhibit was closed, O'Loughlin posted a note on its vehicles stating that "show prices are good thru next Sunday April 17th." RP at 360-61, Ex. 13.

Alleging that DOL's enforcement of the statute violated To-Ro's constitutional rights under the Commerce Clause and the First and Fourteenth Amendments, To-Ro

---

[1] DOL's position was consistent with To-Ro's own manual for exhibitors, which stated that participating dealers must obtain Washington licenses and mentioned no licensing exception for vehicles that were marked "For Display Only."

filed a declaratory judgment action in March 1995 challenging the constitutionality of RCW 46.70.021; To-Ro sought damages under 42 U.S.C. § 1983 and also claimed that DOL had tortiously interfered with To-Ro's business expectancy.[2] O'Loughlin claimed that, because Lake City RV was a major exhibitor in the Spokane RV show, patrons had demanded refunds after its exhibit was closed. O'Loughlin asserted that, to compensate for the exhibit's closure, he had offered free admission on Friday evening and had reduced ticket prices for Saturday and Sunday, and he cited as an additional loss his refund of Lake City RV's rental fee of $4,800.

On cross-motions for summary judgment, the trial court dismissed To-Ro's Commerce Clause claim for lack of standing. The court also dismissed To-Ro's claim that RCW 46.70.021 violated the First Amendment on its face, but the court simultaneously entered a second order ruling that the statute neither prohibited unlicensed dealers from displaying and pricing their RVs at trade shows nor

---

[2] To-Ro's complaint, filed March 6, 1995, in Spokane County Superior Court (No. 95-2-01225-1), was not included in the clerk's papers. Under RAP 9.6(b)(1)(D), To-Ro was required to include in the clerk's papers, if not the final complaint and answer, a final pretrial order or other pleadings setting out the issues to be tried. In its summary judgment memorandum, To-Ro states that it seeks "a legal determination that RCW 49.70.021 [sic] and RCW 49.70.023 [sic] are unconstitutional on their face" and that "the manner in which the State carried out the enforcement actions . . . was unconstitutional." Clerk's Papers (CP) at 78. To-Ro's trial brief provides that "[t]his case now comes on for trial on the plaintiff's claims for damages that the conduct of the state agents tortiously interfered with its business relations in violation of 42 U.S.C. § 1983." CP at 482.

precluded product representatives from accompanying those displayed vehicles.

When the case went to trial, the parties disagreed as to the meaning of the second order, so the court prohibited any mention of the order in opening statements. At the close of the evidence and outside of the jury's presence, the court dismissed all of To-Ro's causes of action. The court ruled that, because Lake City RV was unlicensed, it had no property interest that would give rise to a procedural due process claim and that, even if Lake City RV had had such a claim, To-Ro lacked standing to assert it. Having determined that To-Ro lacked standing to raise its Commerce Clause and due process claims, the court dismissed To-Ro's claim for damages under 42 U.S.C. § 1983, accepting as a second basis for dismissal the State's qualified immunity defense.

The court also addressed the implications of the second summary judgment order, which it termed a "stipulation . . . without the court's independent ruling." RP at 517. In the court's view, the transcript of the summary judgment hearing showed that the court had never ruled on whether RCW 46.70.021 prohibited an unlicensed dealer from participating in a trade show on a "display only" basis. The court recognized that at trial the State had argued a position contrary to the stipulation and that To-Ro had not objected. Thus, contrary to the disputed order, the court ruled "that displaying products at a trade show where the products are physically present with the public is engaging in business . . . as contemplated by the Department of Licensing regulations or statutes." RP at 586. The court rejected To-Ro's claim that RCW 46.70.021 violated the First Amendment.In ruling that the statute

had been fairly applied to exclude Lake City RV, the court foreclosed the tortious interference claim because, as the State argued and the court agreed, To-Ro could have no valid business expectancy from a party in violation of the law.

After dismissing all claims, the court submitted, with the parties' approval, three questions to the jury.[3] The court reasoned that, if the State were indeed bound by the second summary judgment order (wherein the parties had stipulated that the licensing statute did not apply to dealers participating on a "display only" basis), the jury would need to resolve certain factual questions. Consequently, the jury was asked whether To-Ro had proven (1) that no prices were ever displayed on Lake City RV's vehicles, (2) that "For Display Only" signs had been posted on Lake City RV's vehicles at all times during the show, and (3) that the State's closure proximately caused To-Ro damages. The verdict form also asked the jury to state the amount of damages, should it answer the third

---

[3] In its notice of appeal (which, contrary to RAP 9.6(b)(1)(A), To-Ro did not include in the clerk's papers), To-Ro refers to a March 10, 1998, order "[s]ubmitting advisory interrogatories to the jury." The Court of Appeals termed it an "advisory verdict." *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 488 n.4, 997 P.2d 960 (2000). The verdict form simply bears the title "Verdict," but under CR 49(a) this was a special verdict, a series of findings on three issues of fact. CP at 549. That this was a special verdict form was made clear in the trial judge's instructions to the jury: "You will be furnished the exhibits admitted into evidence, these instructions, and a *special verdict form* which consists of several questions for you to answer." Report of Proceedings (RP) at 538 (Instruction 7) (emphasis added).

question affirmatively. The jury answered "No" to all three questions.[4]

To-Ro appealed. The Court of Appeals affirmed the trial court, holding that To-Ro lacked standing to challenge the State's enforcement of RCW 46.70.021 against Lake City RV. *To-Ro Trade Shows*, 100 Wn. App. at 493-94. We granted To-Ro's petition for review.

## ISSUE

Did To-Ro present a justiciable controversy under the Uniform Declaratory Judgments Act?

## ANALYSIS

To-Ro sought a declaration under the Uniform Declaratory Judgments Act that Washington's dealer licensing statute, RCW 46.70.021, unconstitutionally precluded unlicensed dealers from displaying their vehicles at trade shows held in Washington. The challenged licensing statute, which aims to protect Washington consumers from "frauds, impositions, and other abuses," makes it "unlawful for any person, firm, or association to act as a vehicle dealer . . . , *to engage in business* as such, . . . [or] *solicit sales* as such, . . . without first obtaining and holding a current license as provided in this chapter." RCW 46.70.005, .021 (emphasis added). The trial court dismissed To-Ro's claims attacking the statute,

---

[4] *See* CP at 549. The Court of Appeals entered an order on April 21, 2000, unsealing the verdict and making it a public record.

and the Court of Appeals affirmed, denying relief under the Act. Recalling the Act's provision that "[a]ll orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees," we apply the customary principles of appellate review. RCW 7.24.070; *see Nollette v. Christianson*, 115 Wn.2d 594, 599-600, 800 P.2d 359 (1990). Because To-Ro has contested no factual findings but seeks reversal of the trial court's legal conclusions, our review of the trial court's denial of declaratory relief is de novo. *Nollette*, 115 Wn.2d at 600.

The Act provides in part that "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. In *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973), we acknowledged that, "in the absence of the intrusion of issues of broad overriding public import, [we had] steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy." We defined a justiciable controversy as "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815, *see also Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160,

164-65, 80 P.2d 403 (1938). Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.[5] In sum, the four justiciability factors must "coalesce" to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution. *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.

We agree with the Court of Appeals that To-Ro failed to meet the third justiciability requirement. *See To-Ro Trade Shows*, 100 Wn. App. at 493. To-Ro did not show that its "interests" in the dispute over DOL's enforcement of the dealer licensing statute were "direct and substantial" as opposed to "potential, theoretical, abstract or academic." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. Under the Act, "[o]ne may not . . . challenge the constitutionality of a statute unless it appears that he will be *directly* damaged in person or in property by its enforcement." *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941) (emphasis added); *see also Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (finding that petitioners' failure to identify any "actual, concrete harm" caused by Initiative 601 precluded declaratory action).

---

[5] As we have noted, "under the Declaratory Judgments Act, the requirement of standing tends to overlap justiciability requirements." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) (citing 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 602, at 394 (5th ed.1996)). *See also* Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U.L. Rev. 695, 717 (1999).

The jury rejected To-Ro's claim that the State's 1994 closure of the Lake City RV exhibit had damaged To-Ro.[6] To the extent that To-Ro contended that the licensing statute had an adverse financial impact beyond the alleged harm from the Lake City RV closure, To-Ro failed to show that its interests were direct and substantial, rather than contingent and inconsequential.

Support for this conclusion is found in prior analogous cases. In *Washington Beauty College*, a hairdressing school challenged a Washington statute that required a person to obtain a high school education as a prerequisite to becoming a licensed hairdresser. The school claimed to have enrolled a number of students who would be unable to procure a high school education after completing the course. The school thus asserted that the statute unconstitutionally interfered with its right to contract with those students and with other prospective students. Affirming the trial court, this court concluded that "[n]o showing ha[d] been made of any *direct or substantial* injury threatened or suffered by [the beauty college] so as to present a justiciable issue." *Washington Beauty Coll.*, 195 Wash. at 165 (emphasis added). The school's "interest [was] *too remote* to entitle it to invoke the declaratory

---

[6] By repeatedly asserting that the State's enforcement of the dealer licensing statute harmed To-Ro financially, the dissent simply champions To-Ro's unproven claims. Even though the trial judge's submission of the special verdict form to the jury was highly unusual and has no binding legal effect, the jury in this six-day trial received To-Ro's evidence, heard its closing argument on damages, and concluded that the closure of the Lake City RV display did not proximately cause To-Ro's damages. *See* RP at 541-46, 549-50, 557-61.

judgment[s] act." *Id.* (emphasis added). While it might have been conceivable that the additional statutory requirement could have discouraged some enrolled or prospective students, the school could not prove an immediate, significant effect on its enrollment.

We considered a similar circumstance in *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993). There, in order to secure sewer service from the City of Yakima, homeowners outside the city limits signed agreements binding them to support a future annexation. The homeowners and the local fire district later sought a declaratory judgment nullifying the agreements. On direct review, we affirmed the trial court's dismissal of the fire district for lack of standing. We reasoned that, while the fire district's value would be diminished by annexation, the homeowners' annexation agreements did not directly affect the fire district because those agreements did not ensure annexation. They provided only 66 percent of the necessary 75 percent of the property value required for annexation, and a successful annexation petition would remain vulnerable to further governmental review. Thus, although the agreements increased the likelihood of annexation, the fire district's interest in their validity could not satisfy the justiciability requirement of a direct and substantial interest in the dispute over the agreements' validity. *Yakima County (West Valley) Fire Prot. Dist. No. 12*, 122 Wn.2d at 379-80. In sum, just as the losses of the beauty college were contingent on the intervening event of lower enrollment, the losses that the fire district anticipated were dependent on the intervening prospect of annexation; absent any certainty of annexation or

lower enrollment, the plaintiffs in the two cases could not satisfy the third justiciability factor.

To-Ro did not prove that DOL's enforcement of the statute against unlicensed dealers had harmed (or would harm) To-Ro directly and substantially. As a consumer show promoter, To-Ro makes money by renting exhibit space to dealers and charging admission to patrons. To-Ro did not show that there was a pool of RV dealers who wanted to forgo the licensing process and display their vehicles with no prices affixed. To the contrary, motor vehicle dealers testified that it was unimaginable that dealers would incur the expense of participating in an RV trade show if they were not allowed to sell vehicles at the show. Moreover, as the State pointed out, "[i]t is likely that licensed dealers would oppose unlicensed dealers enjoying the benefits of engaging in business in Washington without paying for a license." Resp't's Answer to Amicus at 9. Nor did To-Ro show that the statute caused To-Ro to miss out on a large market of patrons who were eager to attend shows featuring unlicensed out-of-state dealers exhibiting vehicles bearing no price tags. Therefore, just as we determined that the enforcement of the statute in *Washington Beauty College* and the validation of the agreements in *Yakima County (West Valley) Fire Protection District No. 12* caused no direct, substantial financial harm to the beauty college or the fire district, here, we conclude that DOL's enforcement of the statute's prohibition against display by unlicensed dealers caused no demonstrably direct or substantial financial harm to To-Ro.

This third justiciability requirement of a direct, substantial interest in the dispute encompasses the doctrine

of standing. To have standing to challenge the constitutionality of a statute, a party must show, in addition to "sufficient factual injury," that " 'the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 494, 493, 585 P.2d 71 (1978) (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970)). To-Ro asserts that RCW 46.70.021 violates its First Amendment rights by prohibiting it from allowing unlicensed dealers to display their vehicles at its trade shows. But plainly, To-Ro's interest in seeking declaratory relief lies outside the zone of interests regulated by RCW 46.70.021. The purpose of the dealer licensing statute is to protect the public from "frauds, impositions, and other abuses" by vehicle dealers. RCW 46.70.005. To-Ro is not a vehicle dealer, licensed or otherwise, nor is it acting in a representative capacity for any organization of consumers or vehicle dealers. *See Vovos v. Grant*, 87 Wn.2d 697, 700, 555 P.2d 1343 (1976) (interest sufficient to confer standing may be shown in personal or representative capacity). The interest To-Ro is seeking to protect is its own theoretical interest in increasing the number of exhibitors participating in its trade shows. To-Ro's potential financial interest as a show promoter clearly does not coincide with the statute's aim of protecting consumers from fraudulent or abusive conduct by vehicle dealers. We must conclude that, because To-Ro is not within the zone of interests regulated in RCW 46.70.021, it lacks standing to challenge the statute on First Amendment grounds; any such challenge would belong to the excluded dealer, not To-Ro.

Although the Court of Appeals confined its analysis to the third justiciability factor, we reach the additional conclusion that To-Ro likewise failed to satisfy the first requirement – demonstration of "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. On the one hand, were we to limit our focus to the State's 1994 closure of the Lake City RV exhibit, we would necessarily conclude that To-Ro's dispute with the State is moot. Even if we were to determine that the dealer licensing statute should not have been enforced against an unlicensed dealer participating on a "display only" basis, such a pronouncement would be academic because the jury in this case made the uncontested factual determination that Lake City RV had *not* participated on a "display only" basis. If, in the alternative, we decline to limit our consideration of the dispute between To-Ro and the State to the 1994 Lake City RV closure, then the dispute To-Ro presents is "dormant, hypothetical, [or] speculative." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. As discussed above, To-Ro has not shown that there are unlicensed dealers waiting in the wings to display their unpriced vehicles at a To-Ro trade show. Just as we have repeatedly refused to find a justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation, we do not find a justiciable controversy here. *See, e.g., Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815 (where minor child's tort claim against lessor remained "an unpredictable contingency," the matter was "not ripe for declaratory relief"); *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92

Wn.2d 789, 806, 597 P.2d 383 (1979) (where issue of Port's future actions on certain contract rights "appear[ed] to be founded on a hypothetical factual situation," declaratory judgment was inappropriate); *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 331, 684 P.2d 1297 (1984) (where party who was neither pregnant nor terminally ill challenged statute nullifying health care directive of pregnant or terminally ill patient, cause was not "ripe" for declaratory judgment); *Lawson v. State*, 107 Wn.2d 444, 460, 730 P.2d 1308 (1986) (where railroad had not abandoned right of way and county had expressed no intent to acquire it, property owners' challenge to statutes permitting recreational public use of rights of way was "premature").

Where the four justiciability factors are not met, "the court steps into the prohibited area of advisory opinions." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. We exercise our discretion and deliver advisory opinions only "on those rare occasions where the interest of the public in the resolution of an issue is overwhelming" and where the issue has been "adequately briefed and argued." *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 122-23, 736 P.2d 639, 744 P.2d 340 (1987) (Utter, J., concurring) (quoting *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 895, 529 P.2d 1072 (1975)); *see also Seattle Sch. Dist. No. 1*, 90 Wn.2d at 490. We decline to deliver an advisory opinion in this case. To-Ro's commercial interest in including unlicensed dealers in its trade shows does not appear to be a matter of "broad overriding public import." *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 814. That dealers participating in such trade shows are expected to be licensed was not a matter of confusion; both To-Ro and Lake City RV knew before the show that a

license was required, and To-Ro's own manual referred to the licensing requirement. Far from being raised as a matter of overwhelming public interest, this challenge to the dealer licensing statute arose out of a particular situation in 1994 when To-Ro attempted to fill out an underbooked show by extending a belated invitation to an unlicensed dealer.

## CONCLUSION

While we have acknowledged that the Uniform Declaratory Judgments Act provides a procedure "peculiarly well suited to the judicial determination of controversies concerning constitutional rights and . . . the constitutionality of legislative action," we have resolutely maintained that no decisions should be made under the Act absent a "justiciable controversy." *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 490, *Diversified Indus Dev. Corp.*, 82 Wn.2d at 815. The criteria for identifying a justiciable controversy are now well settled. To satisfy our four-factor justiciability test, a party must demonstrate a direct, substantial interest in an actual, immediate dispute with a truly adverse party, and that dispute must be one that the court's decision will conclusively resolve. *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. Folded into this test are the familiar restraint doctrines. An actual, immediate dispute cannot be moot and must be ripe, and a party lacking a direct, substantial interest in the dispute will lack standing.

To-Ro's challenge to the State's enforcement of RCW 46.70.021, the dealer licensing statute, does not present a justiciable controversy under the Act. We agree with the

Court of Appeals that To-Ro failed to prove a direct, substantial financial interest in the dispute sufficient to confer standing, and we further find that, in light of the jury's factual findings, To-Ro was unable to demonstrate an actual, immediate dispute. Having determined that To-Ro did not establish a justiciable controversy and that this case presents no issues of overwhelming public importance, we affirm the Court of Appeals.

/s/ Owen, J.

WE CONCUR:

/s/ Alexnder, C.J.
/s/ Scott, J.
/s/ Johnson, J.
/s/ Madsen, J.
/s/ Ireland, J.
/s/ Bridge, J.
/s/ Chamber, J.

---

SANDERS, J. (dissenting) – The majority should not be allowed the luxury of denying To-Ro Trade Shows its day in court through unchallenged and inconsistent application of the standing doctrine. We must avoid ad hoc, result-oriented decision making which cripples private litigants who seek to protect their constitutional rights against government infringement.

The majority here concludes To-Ro Trade Shows lacked standing to pursue declaratory relief "because it failed to present an actual, immediate dispute in which it had a direct, substantial interest." Majority at 2. I disagree.

According to the Uniform Declaratory Judgments Act (chapter 7.24 RCW), "A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. To-Ro asserts its rights, status, and legal relations are affected by the Washington dealer licensing statute, RCW 46.70.021. The dealer licensing statute provides in part:

> It is unlawful for any person, firm, or association to act as a vehicle dealer or vehicle manufacturer, to engage in business as such, serve in the capacity of such, advertise himself, herself, or themselves as such, solicit sales as such, or distribute or transfer vehicles for resale in this state, without first obtaining and holding a current license as provided in this chapter. . . .

RCW 46.70.021. To-Ro asserts the State's enforcement of this statute affects its legal rights, and questions the construction and validity of the statute pursuant to the Uniform Declaratory Judgments Act. Specifically To-Ro "seeks a declaration that RCW 46.70 is unconstitutional to the extent advertising, display or exhibition of products and pricing at a trade show is reserved exclusively to State licensed dealers." Pet. for Discretionary Review at 7.

We have previously held "before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy." *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). A justiciable controversy is one

> (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Id.* To-Ro meets each of these four factors and thus has standing to seek relief under the Uniform Declaratory Judgments Act, more so, I think, than did Amalgamated Transit Union which feared the loss of government expenditures through the initiative's repeal of a tax for general revenue purposes. *Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 11 P.3d 762 (2000).

To-Ro is in the business of producing consumer shows. Producers of such events make money in two ways: (1) they rent space in a convention center or exhibit hall and then sell exhibit space to exhibitors; and (2) they charge an admission fee to members of the general public who wish to attend the show. Amicus Br. at 3. One of the exhibitors to whom To-Ro sold exhibit space for its 1994 Spokane Spring RV Show was Lake City RV. Trade show patrons demanded refunds directly from To-Ro when the Department of Licensing shut down the Lake City RV exhibit. Report of Proceedings (RP) at 228. To-Ro also had to offer free admission on the evening the exhibit was shut down and reduced ticket prices for the remainder of the show. RP at 229-31. Finally, To-Ro gave Lake City RV a refund of its $4,800 rental fee. RP at 262. To-Ro lost

money as a result of the enforcement of this statute and therefore has standing to challenge it.

The majority erroneously concludes To-Ro does not satisfy the first prong of the test for determining whether a plaintiff presents a justiciable controversy for purposes of the Uniform Declaratory Judgments Act by weighing the facts. However we must judge the existence of a justiciable controversy from the facts as *alleged* by the plaintiff, not by the facts as ultimately proved. *See Acme Finance Co. v. Huse*, 192 Wash. 96, 107, 73 P.2d 341 (1937).

To-Ro's pleadings clearly present an actual dispute or at least the mature seeds of one. Moreover the factual record establishes To-Ro's loss of revenue is real and demonstrable. To-Ro's assertion – that it will continue to lose money if dealers who are not licensed by the State of Washington are prohibited from participating in trade shows, even if they do so *only to advertise* their products – is a logical imperative. The majority's criticism that To-Ro failed to show "that there are unlicensed dealers waiting in the wings to display their unpriced vehicles at a To-Ro trade show" is wrong. Majority at 17. There very plainly are such dealers; Lake City RV is among them. Moreover, as amicus argues, the success of a trade show is contingent upon the reputation the show has with exhibitors and the general public. Amicus Br. at 3. Therefore the negative impact of forcing To-Ro to close a substantial portion of its 1994 Spokane Spring RV Show will at least arguably affect its ability to attract exhibitors and attendees in the future. *Id.* We are not, as the majority suggests, faced with a situation "where the event at issue has not yet occurred or remains a matter of speculation."

Majority at 17. Here the event, To-Ro's loss, has occurred and will arguably continue to occur.

Neither the majority here nor the Court of Appeals below contends the second justiciability requirement is not met. To-Ro and the Department of Licensing have genuine and opposing interests. To-Ro asserts RCW 46.70.021 is unconstitutional and the Department of Licensing asserts the constitutional challenge to the statute is without merit. Pet. for Discretionary Review at 5; Answer to Pet. at 9.

The majority and the Court of Appeals do however agree "To-Ro did not show that its 'interests' in the dispute over DOL's [Department of Licensing] enforcement of the dealer licensing statute were 'direct and substantial' as opposed to 'potential, theoretical, abstract or academic.' " Majority at 10 (quoting *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815). I disagree. To-Ro lost a substantial sum of money when DOL shut down the Lake City RV exhibit. It had to give refunds to disgruntled patrons, open its gates for free, and refund Lake City RV's $4,800 registration fee. This is undisputed. The majority correctly states, "Under the Act, '[o]ne may not . . . challenge the constitutionality of a statute unless it appears that he will be *directly* damaged in person or in property by its enforcement.' " Majority at 10-11 (quoting *De Cano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941)). Notwithstanding, the majority then summarily dismisses the fact that To-Ro lost well over $5,000 as a direct result of DOL's enforcing RCW 46.70.021. The majority simply ignores withdrawal of an exhibit from a trade show directly injures the producer of the show. A trade show producer makes money by renting space to exhibitors and charging

admission to patrons. The removal of an exhibitor from a trade show necessarily has a direct impact on the business of the trade show producer. I think To-Ro not only has alleged injury, it has proved it.

Further, the cases cited by the majority to support its conclusion must be distinguished. *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima,* 122 Wn.2d 371, 379, 858 P.2d 245 (1993) specifically recognizes "[p]arties whose financial interests will be affected by the outcome of a declaratory judgment action have standing." We ultimately determined the fire district in *Yakima County* lacked standing to seek declaratory judgment because it was not directly affected by the homeowner agreements[1] it sought to nullify. *Id.* The fire district's interests would be affected only if the City of Yakima actually annexed the properties subject to the homeowner agreements. *Id.* at 380. While the homeowner agreements arguably made annexation easier, they did not make annexation a *fait accompli,* and therefore any damage to the interests of the fire district remained entirely speculative. *Id.* But the situation in *Yakima County* is markedly different from the one presented here. To-Ro has suffered a demonstrable financial loss resulting from DOL's enforcement of the dealer licensing statute. Moreover To-Ro's financial interests will be affected by the outcome of the declaratory judgment it seeks: If the dealer licensing statute is, as To-Ro argues, unconstitutional, then To-Ro

---

[1] To receive sewer service from the City of Yakima landowners were required to sign a future petition for annexation. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 375, 858 P.2d 245 (1993).

will be permitted to sell exhibit space at its trade shows to all exhibitors like Lake City RV.

Similarly, the majority's reliance on *Washington Beauty College, Inc. v. Huse,* 195 Wash. 160, 80 P.2d 403 (1938) is misplaced. Washington Beauty College challenged the validity of section 3(a) of chapter 215, Laws of 1937, which required hairdressers licensed by the State to hold a high school diploma. *Washington Beauty College,* 195 Wash. at 161. The college filed suit pursuant to the Uniform Declaratory Judgments Act asserting the statute was unconstitutional. *Id.* The college argued the statute adversely affected its ability to attract and retain students and it nullified contracts with existing students. *Id.* at 162. We determined the college lacked standing to sue because its interests were too remote. *Id.* at 165. We found "[n]o showing has been made of any direct or substantial injury threatened or suffered by appellant so as to present a justiciable issue." *Id.*

To-Ro however presents a different situation. Here the party seeking declaratory relief has suffered a direct and substantial injury including loss of cash and reputation. In contrast to the injury alleged in *Washington Beauty College* and *Yakima County* which was speculative and uncertain, the injury here is concrete and demonstrable.

To-Ro also meets the fourth justiciability factor. As previously indicated, a judicial determination of the constitutionality of the dealer licensing statute will resolve the dispute between To-Ro and DOL. If the statute is found unconstitutional, To-Ro must be permitted to sell

exhibit space to out-of-state exhibitors who wish to participate in a trade show to advertise their products and should recover its damages.

In support of its First Amendment claim To-Ro likens its situation to that of a bookseller or theater owner, entities that have traditionally been given standing to vindicate the rights of third parties. To-Ro asserts it is a "'clearinghouse' for expression and as a practical matter is in a far better position to vindicate First Amendment rights, ensure public access and thwart excessive governmental intrusion upon the free exchange of ideas and information than individual show patrons or exhibitors." Pet. for Discretionary Review at 8. The Ninth Circuit concluded in *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 568 (9th Cir. 1984), "a concert promoter, like a bookseller or theater owner, is a type of 'clearinghouse' for expression." The court further concluded the promoter, rather than the individual patrons or performers, was in the best position to vindicate First Amendment rights. *Id.* To-Ro argues the same principle should apply to trade show promoters. To-Ro asserts the dealer licensing statute impermissibly infringes on the First Amendment rights of trade show exhibitors and, as a promoter of trade shows, it is in the best position to vindicate those rights. Pet. for Discretionary Review at 8.

The majority asserts "To-Ro's interest in seeking declaratory relief lies outside the zone of interests regulated by RCW 46.70.021." Majority at 15. But To-Ro must only show " ' "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or *constitutional guarantee in question.*" ! " Majority at 15 (emphasis added) (quoting *Seattle*

*Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 494, 585 P.2d 71 (1978)). Here To-Ro is asserting the First Amendment right to use the forum it provides. DOL's enforcement of the dealer licensing statute affects the constitutional guarantees provided in the First Amendment. Nor does it defeat First Amendment standing if To-Ro is able to turn a profit on the expressive conduct of exhibitors who participate in its trade shows. *See Cinevision*, 745 F.2d at 567 ("[E]ven though concert promoters generally promote concerts for profit, they still enjoy the protections of the first amendment."). Moreover, as recognized by *Seattle School District No. 1*, we are supposedly liberal in our view of who has standing to seek declaratory relief. *Seattle Sch. Dist. No. 1*, 90 Wash.2d at 493. *See also* RCW 7.24.120 ("This chapter is declared to be remedial . . . and is to be liberally construed and administered.").

Finally, I am troubled by the majority's reliance on the jury's advisory verdict in this case. Majority at 11. At the point the jury deliberated, there was really nothing for them to decide since all To-Ro's claims had been dismissed for lack of standing. Quixotically three questions were sent to the jury *on an advisory basis only. Id.* I cannot fathom why this Court should rely on a "highly unusual" *advisory* jury verdict that "has no binding legal effect." Majority at 11 n.6. Moreover the issue is whether To-Ro had standing, not whether it proved its damages to the jury's satisfaction. In any event a defense verdict on damages does not mean the plaintiff lacks standing to pursue the litigation, only that it couldn't convince the jury by a preponderance of evidence that it should be compensated. The majority's analysis is bootstrapping.

Based on the foregoing I believe To-Ro has presented a justiciable controversy and therefore has standing to invoke the Uniform Declaratory Judgments Act.

Accordingly, I dissent.

/s/ Sandra, J.

**THE SUPREME COURT**
**OF WASHINGTON**

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOW,<br><br>Petitioner,<br><br>v.<br><br>GRANT COLLINS and KATHY BARROSFRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON, and ROBERT SMITH, and JOHN DOES 1 Through 5,<br><br>Respondents. | NO. 69753-1<br><br>**ORDER**<br><br>C/A NO. 23126-3-II |

Department I of the Court considered this matter at its October 10, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review and the Petitioner's Motion to Strike Reply to Answer are both granted.

DATED at Olympia, Washington this 11th day of October, 2000.

/s/ Richard P. Gray
CHIEF JUSTICE

**IN THE COURT OF APPEALS**
**OF THE STATE OF WASHINGTON**

**DIVISION II**

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,<br><br>APPELLANT,<br><br>v.<br><br>GRANT COLLINS and KATHY BARROWSFRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON, and ROBERT SMITH, and JOHN DOES 1 Through 5,<br><br>RESPONDENTS. | No. 23126-3-II<br><br>OPINION PUBLISHED IN PART<br><br>Filed:<br>APR 21 2000 |

Armstrong, A.C.J. – Lake City RV sells recreational vehicles through its Idaho dealership located thirteen miles from the Washington State border. Lake City displayed vehicles at an RV trade show in Spokane sponsored by To-Ro Trade Shows d/b/a O'Loughlin Trade Shows. But Lake City is not a Washington dealer licensed to operate its business in Washington as required by statute. At the trade show, an agent of the Department of Licensing ("DOL") instructed Lake City to close and lock its displayed RV units. Lake City did so. As a result, a number of show patrons demanded refunds.

To-Ro, the trade show promoter, sued (1) for a declaration that the statute as enforced by DOL is unconstitutional, (2) for damages under 42 U.S.C. § 1983, and (3) for

damages resulting from tortious interference with its business expectancy. To-Ro alleged that DOL's action and the statutory licensing requirements violate its and the out-of-state dealer's First Amendment and equal protection rights. To-Ro also alleged that the statute discriminates against out-of-state dealers under the Commerce Clause. The trial court dismissed To-Ro's claims. Holding that To-Ro lacks standing to challenge the constitutionality of the licensing scheme, we affirm.

## FACTS

To-Ro produces and promotes trade shows throughout the Northwest, including a spring RV show in Spokane. The Spokane show draws patrons from Washington, Idaho, Montana, and Canada. To-Ro invited Lake City RV to participate in the 1994 show. Lake City is a licensed dealer in Idaho, located thirteen miles from the Washington State border. DOL told both Lake City and To-Ro that Lake City could not participate in the show without a Washington license. But Lake City did not have time to obtain a license before the show.

After the show opened, Collins, a DOL investigator, found out that Lake City was participating in the show. Lake City representatives said they were under the impression that vehicles could be displayed as long as they were not for sale. "For display only" and "not for sale" signs were posted on the vehicles. It was disputed whether prices were actually displayed on the vehicles, whether sales were solicited, and when the "for display only" signs were posted. Collins told Lake City to close

and lock their units until he received further direction from his superiors. Lake City complied.

When Lake City's display was closed, people immediately demanded a refund. To-Ro refunded the ticket price to at least one hundred people and admitted new customers for free. Robert O'Loughlin from To-Ro also testified that Lake City committed to purchase space at its 1995 Spokane RV show but cancelled at the last minute. According to O'Loughlin, Lake City RV could not get a waiver of the statutory requirement for an in-state location and did not have the money to open a second location in Washington. *See* RCW 46.70.023; 46.70.025.

To-Ro sued, alleging three causes of action: (1) a declaratory judgment action challenging the constitutionality of the licensing statutes; (2) an action for damages under 42 U.S.C. § 1983, alleging due process and First Amendment violations arising from DOL's enforcement of the statute at the Spokane trade show; and (3) an action in tort for interference with To-Ro's business expectancy.

In its declaratory judgment action, To-Ro challenged the constitutionality of the licensing scheme under the First Amendment,[1] the Equal Protection Clause,[2] and the Commerce Clause.[3] Under the First Amendment, To-Ro challenges RCW 46.70.021, which provides in part:

---

[1] U.S. CONST. amend. I.

[2] U.S. CONST. amend. XIV.

[3] U.S. CONST. art. I, § 8, cl. 3.

> It is unlawful for any person, firm, or association to act as a vehicle dealer or vehicle manufacturer, to engage in business as such, serve in the capacity of such, advertise himself, herself, or themselves as such, solicit sales as such, or distribute or transfer vehicles for resale in this state, without first obtaining and holding a current license as provided in this chapter, . . .

To-Ro argues that the statute, to the extent it prohibits advertising, violates free speech principles. According to To-Ro, if an out-of-state dealer does not engage in sales activity, the First Amendment guarantees the dealer the right to participate in trade shows by advertising, displaying, and promoting products without obtaining a Washington license.

To-Ro's equal protection argument is based on DOL's interpretation of the statute that allows unlicensed, out-of-state dealers to advertise in Washington newspapers or on television but prohibits them from displaying vehicles at a trade show. A DOL representative said that an Idaho dealer can advertise in a newspaper or on television if "they're saying come to Idaho and buy these vehicles." But out-of-state dealers are prohibited from displaying vehicles in Washington.

Under the Commerce Clause, To-Ro challenges the constitutionality of RCW 46.70.023, which requires that "[t]he business of a vehicle dealer . . . be . . . carried on at an established place of business." Established place of business means "a permanent, enclosed commercial building located within the state of Washington easily accessible at all reasonable times." RCW 46.70.023.

Both parties moved for summary judgment. The trial court dismissed To-Ro's Commerce Clause and First Amendment claims for lack of standing. But the court entered an order on summary judgment, ruling that RCW 46.70.021 does not prohibit the display or pricing of RV's at trade shows by unlicensed dealers and that product representatives could accompany such vehicles.

The case went to trial on To-Ro's tortious interference and Section 1983 claims. To-Ro argued that it was deprived of due process and its First Amendment right to free speech and was, therefore, entitled to damages under Section 1983. At trial, the parties disagreed as to the meaning of the summary judgment orders and the issues to be decided at trial. To-Ro interpreted the second order as a declaration that product display by unlicensed dealers was permitted in the State of Washington. DOL said the order was offered as an interpretation to assist the parties at an upcoming show. The court prohibited the parties from mentioning the order in their opening statements. To-Ro was not allowed to argue its First Amendment or due process claims to the jury but was permitted to present the facts of its tortious interference claim.

Following trial, the court dismissed all causes of action. The court ruled that Lake City did not have a protected property interest that would give rise to a procedural due process claim and, even if Lake City did, To-Ro lacked standing to bring the claim. The court also dismissed the Section 1983 claim, ruling that the State had qualified immunity. And in contradiction to its previous order, the court ruled that prohibiting the display of vehicles by unlicensed dealers was not a violation of

the First Amendment. Although this ruling precluded the issue of tortious interference from going to the jury, the court, with the parties' consent, submitted three questions to the jury on an advisory basis.[4] The jury answered "no" to each of the following questions:

1. Did the Plaintiff prove that no prices were displayed for specific Lake City RV vehicles at the show at any time the show was open to the public?

2. Did the Plaintiff prove that Lake City RV vehicles at the show were marked with "For display only" signs at all times the show was open to the public?

3. Did the Plaintiff prove that Defendants' closure of the Lake City RV display proximately caused the Plaintiff damages?

## ANALYSIS

### Does To-Ro have standing under the Declaratory Judgments Act?

The State argues that To-Ro does not have standing to raise constitutional challenges to the licensing requirements for motor vehicle dealers. To-Ro responds that it may act in a representative capacity on behalf of out-of-

---

[4] The advisory verdict was sealed by the trial court. DOL has requested that the verdict be unsealed, and we have done so under separate order. Under GR 15(h), "[a] file, or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Cases sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court." *See also* GR 15(d)(2).

state dealers who want to display their products in Washington and on behalf of out-of-state residents interested in viewing products from their home state at a Washington trade show. In addition, To-Ro argues that the licensing requirements prevent it from presenting a broad array of products at its trade show.

Citing *Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), To-Ro notes that representative suits have been recognized in Commerce Clause cases. But *Hunt* is distinguishable. There, the Washington State Apple Advertising Commission was a state agency whose purpose was to promote the interests of apple growers. *Hunt*, 432 U.S. at 336-37. To-Ro is not a member of an association that represents out-of-state dealers and is not charged with the responsibility of promoting the interests of RV dealers.

*Hunt* is also distinguishable because the suit was brought in federal court. The standing requirement in federal courts is based primarily on the "case or controversy" requirement of Article III, Section 2 of the United States Constitution. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 705-07 (1999). In addition to the constitutional constraint of subject matter jurisdiction on federal court jurisdiction, the federal courts have imposed prudential constraints flowing from the case and controversy requirement. *Warth*, 422 U.S. at 499-501; Talmadge, *supra* at 706. Thus, the "federal courts will generally not hear cases that are moot, lack ripeness, require advisory opinions, or in which the plaintiff lacks standing." Talmadge, *supra* at

706-07 (footnotes omitted). In contrast, the Washington State superior courts are courts of general jurisdiction and are not constrained by subject matter jurisdiction under Article III, Section 2. *See* Talmadge, *supra* at 708-11. Thus, we first review the standing issue under Washington's Declaratory Judgments Act, RCW Ch. 7.24, and the cases interpreting it.

Under the Declaratory Judgments Act, "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. Because Washington courts are prohibited from rendering advisory opinions, the party seeking a declaratory judgment must present a justiciable controversy. *See Walker v. Munro*, 124 Wn.2d 402, 411, 414, 879 P.2d 920 (1994). A justiciable controversy means:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Walker*, 124 Wn.2d at 411 (quoting *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990)).

Under this standard, To-Ro's interests must be "direct and substantial," and it may not challenge the licensing statute based on the potential or theoretical

interests of out-of-state residents or unlicensed dealers. To-Ro also argues that DOL's interpretation and enforcement of the licensing statute directly affects its ability to present a broad array of products and, thereby, draw more customers to its show. And To-Ro claims an economic impact: When Lake City withdrew from the show, To-Ro had to refund money, admit customers for free, and reduce ticket prices. In addition, To-Ro claims that Lake City could not attend its 1995 show because the cost to set up an in-state location was prohibitive.

But relying on *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403, 114 A.L.R. 1361 (1938), the State argues that To-Ro is not directly affected by the dealer licensing statute. The State argues that only a person who is subject to the licensing requirement has standing to sue. In *Washington Beauty College*, the owner of a beauty school challenged a statute requiring that hairdressers have a high school education. The school claimed that this requirement interfered with its ability to contract with students and prospective students. *Washington Beauty College*, 195 Wash. at 162. The State Supreme Court held that the school's interest was "too remote" to bring a declaratory judgment action. *Washington Beauty College*, 195 Wash. at 165. The court concluded:

> [The statute is] directed essentially to students, who desire to qualify so as to secure a license to act as a hairdresser and to engage in the practice of beauty culture, rather than to beauty schools or colleges as such. No showing has been made of any direct or substantial injury threatened or suffered by appellant so as to present a justiciable issue. In our opinion, its interest is too

> remote to entitle it to invoke the declaratory judgment act.

*Washington Beauty College*, 195 Wash. at 165.

Here, To-Ro argues both an economic interest, as in *Washington Beauty College*, and its inability to present a broad array of products. As to the latter, To-Ro points out that Lake City is the only dealer in the show area who handles certain products. But To-Ro has not shown that other Washington dealers or the manufacturers could not present the products. Indeed, several manufacturers' representatives were present during a meeting at the show between To-Ro, Lake City, and the State. Moreover, To-Ro has not shown that Lake City was necessarily excluded from displaying its products at the show. Lake City applied for a license but withdrew the application because it did not have time to complete the process. And Lake City could have applied for a waiver of the in-state location requirement.[5] Therefore, we conclude that To-Ro failed to show that any products were necessarily excluded from display at the show because of Lake City's aborted attempt to participate. As to To-Ro's second argument, *Washington Beauty College* suggests that economic impact is not enough to confer standing. But in other contexts, the Supreme Court has said that "[p]arties whose financial interests will be affected by the outcome of a declaratory judgment action have standing." *Yakima*

---

[5] Under RCW 46.70.025, "[t]he director may by rule waive any requirements pertaining to a vehicle dealer's established place of business if such waiver both serves the purposes of this chapter and is necessary due to unique circumstances such as a location divided by a public street or a highly specialized type of business."

*County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379, 858 P.2d 245 (1993); *see also Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 493, 585 P.2d 71 (1978).

In *Yakima County*, homeowners and the local fire district challenged the validity of agreements by which homeowners, as a condition of getting sewer service, agreed to support a future annexation. *Yakima County*, 122 Wn.2d at 375-76. The court held that the fire district did not have standing to challenge the procedure because it would be financially impacted only if the annexation was successful; enforcement of the agreements would not ensure annexation, only make it easier. *Yakima County*, 122 Wn.2d at 380.

In *Seattle School Dist.*, the King County School District and others sued the State to compel State funding for basic education. The State argued that the District lacked standing. In rejecting the argument, the court found:

> The interests of the District are not theoretical; they involve actual financial constraints imposed upon the District by the challenged system itself. In short, the interests sought to be protected by the District are within the zone of interest either regulated by the challenged regulations and legislation or by Const. art. 9, §§ 1 and 2. Under these circumstances it would be unreasonable to deny standing to the District which, far from being a nominal party, stands at the very vortex of the entire financing system.

*Seattle School Dist.*, 90 Wn.2d at 493-94.

*Seattle School Dist.* and *Yakima County* demonstrate that, where standing is claimed because of economic impact, the impact must be both direct and certain. In

*Seattle School Dist.*, the District was forced to operate within the financial constraints imposed by the State's failure to fully fund basic education. In *Yakima County*, the Fire District could show only that it would be affected by a *possible* future event, i.e., annexation. Here, To-Ro does not demonstrate a direct and certain financial impact by DOL's enforcement of the statute. While it is true that the State closed Lake City's exhibit, it is still possible, as we have discussed, that Lake City could have been licensed. And, we do not know to what extent Lake City pursued its application in 1995 or whether it even applied for a waiver of the in-state location business requirement in 1995. Further, To-Ro has not shown that Lake City's 1995 cancellation necessarily caused it financial harm. Certainly both businesses knew of the licensing procedures well in advance of that show. Thus, To-Ro had ample opportunity to plan for other dealers or manufacturers to display the products that Lake City carried. And, To-Ro does not demonstrate that it needed Lake City or any out-of-state dealer for the 1995 show to be successful financially. We conclude that To-Ro's claim of financial impact is not sufficiently direct and certain to give it standing to constitutionally challenge the out-of-state licensing requirement imposed upon Lake City.

Our conclusion is also supported by the United States Supreme Court's latest decision involving a First Amendment facial challenge to a California statute. *Los Angeles Police Dep't. v. United Reporting Publ'g Corp.*, ___ U.S. ___, 120 S. Ct. 483, ___ L. Ed. 2d ___ (1999). There, California amended a statute to allow a person access to an arrestee's address only if the person declared that the information would be used for one of five prescribed

purposes and would not be used to sell a product or service. A business that commercially supplied such information to customers sued for a declaration that the statute violated the First Amendment. In denying the challenge, the Court emphasized that facial challenges are rarely allowed and that, because of the personal nature of constitutional rights, one may generally not attack the statute on the basis that it " 'may conceivably be applied unconstitutionally to others . . . not before the Court.' " *United Reporting*, 120 S. Ct. at 488 (quoting *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). Thus, the business could not rely on the statute's effect on its customers, particularly where the customers could challenge the statute themselves "without incurring any burden other than the prospect that their request will be denied." *United Reporting*, 120 S. Ct. at 489. To-Ro faces the same predicament. It seeks to invalidate a statute aimed at others, i.e., out-of-state motor vehicle dealers who can challenge the statute themselves.

We hold that To-Ro does not have a sufficient, "substantial interest" in the constitutional rights asserted to present a justiciable controversy between To-Ro and the State. *Washington Beauty College*, 195 Wash. at 165.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## B. 42 U.S.C. § 1983

To state a claim for damages under 42 U.S.C. § 1983, To-Ro must establish that a person acting under color of state law deprived it of a federal constitutional or statutory right. *Robinson v. City of Seattle*, 119 Wn.2d 34, 58, 830 P.2d 318 (1992) (citing *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989)). Our discussion of standing disposes of To-Ro's Section 1983 claims. The constitutional rights asserted are not of a sufficiently "personal nature" for To-Ro to maintain a Section 1983 action. In addition, the jury in its advisory verdict found that DOL's closure of the Lake City display did not proximately cause damage to To-Ro. Therefore, the court did not err in dismissing To-Ro's Section 1983 claims.

## C. Tortious Interference

To establish a claim for tortious interference with a business expectancy, To-Ro must prove: (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the defendants interfered for an improper purpose or used improper means; and (5) resultant damages. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992) (citing *Pleas v. Seattle*, 112 Wn.2d 794, 800, 774 P.2d 1158 (1989)).

Under the fourth element, To-Ro claims that the improper means was the violation of its First Amendment rights and the denial of due process. We have held that To-Ro lacks standing to raise the constitutional issues.

But even if To-Ro could show improper means through the alleged constitutional violations, the jury concluded that To-Ro failed to prove that Lake City advertised only and did not solicit sales. And To-Ro concedes that pricing the display vehicles would amount to sale activity, which the State can regulate. And again, the jury found that DOL's closure of the Lake City display did not proximately cause To-Ro's damages.

Therefore, we conclude that the trial court did not err in dismissing To-Ro's tortious interference claim.

D. Evidentiary Issues

To-Ro also contends that the trial court erred in preventing it from presenting the following to the jury: (1) reference to the First Amendment; (2) reference to due process; (3) reference to the State failure to consider the First Amendment as an issue in the administrative action; and (4) reference to the State's policy on advertising by unlicensed dealers in print and television. But, based on the portions of the record cited, To-Ro neither objected to these rulings nor made an offer of proof as to any evidence not admitted. More importantly, To-Ro's First Amendment claims are foreclosed by the jury's verdict that Lake City did engage in sales activity at the show. In any event, we have held that To-Ro did not have standing to raise its claimed constitutional violations.

Affirmed.

/s/ Armstrong, A.C.J.
ARMSTRONG, A.C.J.

We concur:

/s/ Seinfeld, J.
SEINFELD, J.

/s/ Hunt, J.
HUNT, J.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,<br><br>Plaintiffs,<br><br>-vs-<br><br>GRANT COLLINS AND KATHY BARROS-FRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON, and JOHN DOES 1 through 5,<br><br>Defendants. | NO. 95-2-03283-1<br><br>ORDER ON MOTION FOR SUMMARY JUDGMENT OF DECLARATORY RELIEF REGARDING RCW 46.70 AS APPLIED TO TRADE SHOW DISPLAYS<br><br>(Filed Feb. 21, 1997) |

This matter having come before the court on cross-motions for summary judgment, and the parties appearing through their respective counsel of record, the Court having ruled on a portion of those claims by separate order, and the court having considered the following material submitted by the parties regarding this motion,:

1) The Defendant's motion for summary judgement with attached memorandum of authorities, and exhibits A through F;

2) The Plaintiff's motion for summary/declaratory judgement; Plaintiff's Memorandum In Support of Plaintiff's Motion for Summary Judgment, Memorandum in

Opposition to Defendant's Summary Judgment Motion, the declaration of Richard Wooster in Support of Plaintiff's Motion for Summary Judgment including attachments thereto including, declarations Robert O'Loughlin, and Frederick Shanaman, with exhibits attached thereto, excerpts of deposition testimony of Scott Degnan, Rick Combs, Grant Collins and Declaration of Richard H. Wooster in Opposition to Defendant's Motion for Summary Judgment including attachments thereto including, declarations Robert O'Loughlin, and Frederick Shanaman, with exhibits attached thereto, excerpts of deposition testimony of Scott Degnan, Rick Combs, Grant Collins and Robert Smith.

3) The Defendant's reply memorandum in support of summary judgment and response to the Plaintiff's motion for summary/declaratory judgment.

4) Plaintiff's Supplemental Memorandum in Support of Plaintiff's Motion for Summary Judgment.

5) Defendant State of Washington's Supplemental Memorandum Opposing Plaintiff's First Amendment Claim.

6) Plaintiff's Reply to Defendants' Supplemental Memorandum Opposing Plaintiff's First Amendment Claim.

The court having heard oral argument and being fully advised the issues presented, now therefore, finds:

~~The conduct of a Trade Show is both commercial speech and entertainment entitled to the protection of the First Amendment. That the sweep of RCW 46.70.021 may in some instances violate protected First Amendment~~

~~rights. That both the First Amendment implications and the criminal sanctions provided in RCW 46.70 make a declaratory ruling appropriate in this case. That the State bears the burden of providing the justification for restrictions of the kind of speech exhibited at a~~

NOW THEREFORE, the court having heard oral argument and being fully advised of the issues presented, now therefore, ORDERS, DECREES AND ADJUDGES that:

A) RCW 46.70.021 does not prohibit the display of recreational vehicles at a trade show by dealer not holding a Washington State dealers license, provided the person displaying such products is otherwise licensed to sell such products by the state of their principal place of business.

B) RCW 46.70 does not prohibit the display of recreational vehicle general product pricing at a trade show for products displayed by persons not holding a Washington State dealer's license provided the pricing information is physically separated from the product and the price for a specific vehicle is not quoted in any manner.

C) RCW 46.70.021 does not prohibit the presence of product representatives accompanying displays of recreational vehicles at a trade show by persons not holding a Washington State dealer's license.

D) Due to the complexity of this case, this court's familiarity with the issues, and the need to prevent inconsistent rulings, it is also ordered that this case shall be assigned to Judge Casey for all further proceedings.

DATED this 21st day of February, 1997.

/s/ Paula Casey
PAULA CASEY, JUDGE
THURSTON COUNTY
SUPERIOR COURT

Presented by:

/s/ Richard H. Wooster
RICHARD H. WOOSTER WSB# 13752

Approved as to form/Notice of Presentation
Waived:
CHRISTINE O. GREGOIRE
Attorney General

/s/ Rene D. Tomisser
RENE D. TOMISSER WSB# 17509
Assistant Attorney General
Attorneys for Defendants

**IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

| | |
|---|---|
| **TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**GRANT COLLINS and MARY RIVELAND in her Official Capacity as the Director of the Department of Licening, THE DEPARTMENT OF LICENSING, THE STATE OF WASHINGTON, and JOHN DOES 1 through 5,**<br><br>**Defendants.** | **No. 95-2-3283-1**<br><br>**REPORTER'S TRANSCRIPT**<br><br>**(VOLUME V)** |

**VERBATIM REPORT OF PROCEEDINGS**

**BEFORE: THE HONORABLE PAULA CASEY, JUDGE**

**BE IT REMEMBERED that this matter came on regularly for TRIAL before the Court in the courtroom of the Thurston County Courthouse in Olympia, Washington, on March 3, 4, 5, 6, 9 and 10, 1998.**

* * *

[468] THE COURT: I guess I'm going to let you proceed with your arguments while we're retrieving the Federal Supplement case and then we'll take a break and I'll read the cases.

MR. TOMISSER: Your Honor, the second portion of this motion that I would like to bring would be to dismiss any first amendment or civil rights claims that may be still alive in this case. And as we've had discussion in chambers, I'm not entirely clear whether or not there still is, but at this point I'm going to make the motion to dismiss it again anyway, and then the court can let me know whether –

THE COURT: I think we better proceed with your motion. I think at least the plaintiff believes those claims [469] are still alive.

MR. TOMISSER: All right. This motion is essentially in two parts; Your Honor. First of all, I want to present the argument that the facts of this case viewed most favorably to the plaintiff simply do not implicate first amendment rights at all.

Secondly, if the court believes – or secondly, I would address that even if there is a first amendment right implicated by the facts of this case, that the state's interest in its regulatory action is outweighed under the balancing test and should be dismissed.

And then finally, and I believe most clearly for this, is a separate argument on the qualified immunity, which is the *Anderson v. Creighton* line of cases, which says if the right at issue has not been clearly established by the case law, the defense is entitled to dismissal under qualified immunity grounds.

So to begin with, Your Honor, on the first amendment claim itself, the case that I have cited to the court in the past and the one that I think most clearly sets forth the

principles that we have at issue here is a case called *Automaxx, Incorporated v. Morales.* It's a Federal Supplement case. 906 F. Supp., Page 394, a 1995 decision from the district court in Texas.

The situation in the *Automaxx* case, Your Honor, was

* * *

[475] statute, the unlicensed dealer statute itself to be a statute that is directed at the regulation of speech rather than conduct, the next thing that has to be done is the court has to engage in the balancing test that is set forth by the –

THE COURT: Let me just interrupt for a minute. The statute, of course, prohibits engaging in business in this state unless motor vehicle dealers are licensed in this state. Who is going to determine whether the activity of displaying at a show is engaging in business activity?

MR. TOMISSER: I think in this case – in this case –

THE COURT: I think that's my decision; isn't that right? It's a legal decision.

MR. WOOSTER: I think that it is.

THE COURT: And the jury is going to make – so far I have determined – do you think that I have determined in the summary judgment that displaying at a trade show is not necessarily engaging in business in this state?

MR. TOMISSER: I don't believe the court has reached that level of inquiry in the case.

MR. WOOSTER: I don't think that the court has gotten to that point yet, either. My understanding of the court's prior ruling, and please jump in and correct me if I'm mistaken, my understanding of the court's prior ruling was that the statute was not unconstitutional on its face and [476] could be interpreted in such a manner that it would be constitutional, and that the court did go on to find certain activities that were expressly not prohibited by the statute, including the display of product and the presence of pricing information with the proviso that the products were not for sale, and finally, that it is not contrary to the statute to have product representatives present.

But I think the issue of engaging in business, I don't think that's the penultimate question in this case to whether or not Lake City RV was engaging in business. I think that term is too imprecise for application in this case.

THE COURT: Well, DOL only has authority to regulate if they were engaging in business.

MR. WOOSTER: That much is true. But I think engaging in business, we can say advertising is an element of engaging in business. Does DOL have the authority to regulate the advertising of an Idaho dealership? And I think that, again, the penultimate question is whether they were engaging in business. Clearly if they weren't engaging in business, DOL has no authority. But there has to be a fit and the burden of establishing that is on the state.

MR. TOMISSER: I think I see where Mr. Wooster is coming from, and this is now a separate argument from what I was just putting on, but that's fine.

The plaintiff's claim for tortious interference [477] with business expectancy has a certain number of elements. If in fact Lake City RV was engaged in business in this case, if we all for the sake of argument would decide that whatever they were doing there was broad enough to fit within whatever we decide the definition of engaging in business is, if they were doing that, then the state had authority to regulate.

And in our view this case is then over at that point as a matter of law because, number one, we had authority to regulate them. They were engaged in business. Our action was proper. And if they were in violation of the law, as we here define it, then that first element of the tortious interference of business expectancy claim can't be made because there isn't a valid expectancy. If in fact it's been determined as a matter of law that Lake City RV was operating illegally under the statute, they were engaged in business, that would be an illegal operation. No valid business expectancy can flow from that.

So I hadn't examined before whether or not this was going to be decided as a question of law, and I thought that it was going to be a question of fact for the jury as to whether or not what Lake City RV did was engaging in business. If the answer to that question is yes, then the defense has been established because then we have unlawful conduct in the case.

If Mr. Wooster is able to convince the jury that [478] they came into this state in the manner that they did and

they didn't do anything other than show those vehicles "for display only," then the court implicitly has had to make a decision that "for display only" is not engaging in business under the facts of this case. Because if you decided otherwise, all their conduct kind of considered together, if the court still determined that Lake City came into the state and right from the opening bell had "for display only" signs, no prices, nothing else, if the state court still considers that engaging in business, then we still have a violation of law.

So I guess on the one hand, Mr. Wooster is correct, if this court makes a decision that that much conduct is engaging in business, then the case is over. If the court considers it to be a question of fact as to whether or not their conduct constitutes engaging in business, then the jury's going to have to make that determination. I think that's how this issue shakes out on that portion of it.

You're just looking at me. You know, is that –

THE COURT: I'm going to let you finish your argument on first amendment and civil rights claims.

MR. TOMISSER: Okay. I was addressing the balancing test.

THE COURT: Uh-huh.

MR. TOMISSER: Your Honor, and this is a case that has its –

[479] THE COURT: I'm trying to figure out under what circumstances we would get to the balancing.

MR. TOMISSER: The circumstances we would get to the balancing, as a general matter, anyway, theoretically if the – the court would first have to decide that the statute at issue and the conduct implicates a first amendment right. If the statute does implicate first amendment rights of the plaintiff, then the federal courts, and primarily it's a case called *Central Hudson* is the seminal case on it, it sets forth what the rules are for analyzing commercial speech regulations.

And in the *Central Hudson* case there is a test that's set up for the court to consider, and what the – the case that I'm really referring to is a later case called *Florida Bar v. Went For It, Incorporated,* which is a United States Supreme Court case from June of 1995 which dealt with what restrictions can be placed on lawyer advertising.

And the court talks about the prongs of the *Central Hudson* case. The gist of it comes down to is there a lower standard of scrutiny for commercial speech than there is for pure political speech? Commercial speech can be regulated. In fact, under certain circumstances it can be completely eliminated if the state has a compelling enough interest. So what the court looks for is whether or not the restriction imposed by the state on this speech at issue was reasonable

* * *

[487] that kind of authority. The *Post* case says you have got to establish that there was a bright line out there. You've got to show through case law, not through general broad propositions, that there was actually a bright line of cases that told us that this sort of activity is protected speech in any particular case.

In other words, the plaintiff would have to have sufficient case law to clearly establish that when the unlicensed dealer came into this state, limited themselves "for display only," that the cases had clearly established that that is commercial speech, that's protected, and such a person does not have to have a license. They're not subject to regulation if that's all they're doing. They do not have that case, and I think the dismissal on that basis, it's clear and mandatory in this case.

THE COURT: Mr. Wooster.

MR. WOOSTER: Thank you, Your Honor. Does the court have the copy of cases that I handed up earlier because I need to refer to them? This –

THE COURT: Yes.

MR. WOOSTER: First, with regard to these issues that are being raised on the question of free speech and first amendment rights, we really have two kinds of speech in this case. We have the entertainment and we have the commercial speech. And the entertainment is the essence of what the [488] trade show is from the promoter's perspective, from the public's perspective, why is the event being held at the Interstate Fairgrounds in Spokane.

THE COURT: But before you get too far into the entertainment part of it, isn't it true that entertainers are paid for their services? In this case the RV dealers weren't paid, they were paying for the privilege to be there. So from the perspective of the plaintiff, I can understand why he might view his role as entertainment, but the conduct of the RV dealers is what is being regulated, and

they are not there for the purpose of entertainment because they're there paying out a lot of money to be there. So they can only be paying out the money because they intend to earn money; right?

MR. WOOSTER: I would disagree.

THE COURT: Okay.

MR. WOOSTER: I would say that they are paying out money in order to enhance the awareness of their products.

THE COURT: So they can sell it.

MR. WOOSTER: To educate individuals not only concerning their product but concerning what the life-style is about.

THE COURT: So they can sell it. The only reason they care if the public knows about their product or about the industry is so they can sell RVs.

MR. WOOSTER: I think that the primary interest [489] would be so that they could sell recreational vehicles.

THE COURT: But now the promoter's interest is quite different.

MR. WOOSTER: That's true. But the exhibitors may have other motivations beyond simply the sales of product. I would certainly agree that the primary motivation is to increase a demand and awareness of product. And theoretically it could be to increase a knowledge of the location of the business.

THE COURT: So they can sell products.

MR. WOOSTER: And that could ultimately result in increased sales of products. But I don't think we can divorce the entertainment value of O'Loughlin and the impact on O'Loughlin from the purpose for them being there, and the testimony is that he goes out and he looks for diversity of product to put on a show so he doesn't have ten people selling the same thing or exhibiting the same thing. People wouldn't be interested in going to see that. So he's looking for diversity in what's going on in the show.

So we've got the entertainment speech and the commercial speech, and commercial speech is speech which proposes a commercial transaction. And so for the purposes of the application of the law to sales or general awareness of products and pricing and things of that nature, that's all commercial speech that deals with commercial transaction.

[490] But in this situation we have an impact on Mr. O'Loughlin and that implicates speech that is beyond commercial speech. And the mere fact that O'Loughlin charges exhibitors for space in his show, charges the public to come in and see his show, does not minimize the entertainment value of the shows that they put on and does not transform what O'Loughlin is doing into purely a commercial profit venture. Even though he does it for profit and he makes money doing the shows, it still is entitled to full first amendment protection.

THE COURT: What's interesting is he is not being regulated by DOL.

MR. WOOSTER: That's correct.

THE COURT: The people who are there for the commercial activity are the ones being regulated by DOL.

MR. WOOSTER: That's correct. In viewing the commercial speech, there is a case that's clearly on point on this issue. It's a Washington case. It's a Washington Supreme Court case on the issue of licensing and the right to do business in the state without a license, and that's *Lawyer's Cooperative Publishing v. Kuntz*, 73 Wn.2d 674, and this decision looks at the issue of doing business in Washington State and the need for a license in Washington State. It states foreign corporations engaged in publishing and sale of books which takes orders in this state, subject to [491] acceptance at its home office and fills the orders by mail, is not subject to RCW 23.60.110, which under proper circumstances requires corporations to complete and prove payment of a license fee before it can bring suit in the State of Washington since the acts constitute an incidental part of the corporation's regular interstate commerce. And it goes on.

There is a pretty clear discussion on that issue of no sales occurring in this state, the sales at hand, no sales are made in this state. The order is taken here but its acceptance occurring only at the plaintiff's home office and its orders are filled through the shipment of property throughout U.S., and it points out that is not subject to the licensing requirements in Washington State.

THE COURT: But to get that question answered or that issue addressed, Mr. O'Loughlin had to convince Mr. Foster to join in this lawsuit, or at least that was my previous ruling.

MR. WOOSTER: That was your previous ruling, but that also goes to the issue of what conduct is being regulated. And it appears to be the state's proposition that any physical presence in the state constitutes doing business and, therefore, we're regulating conduct and not speech.

And the *Automaxx v. Morales* case that he refers to is easily distinguished from this case, because in that case they were brokers of dealers. The statute at issue in that case specifically defined what activities were prohibited without a license, and it says arranging or offering to arrange a transaction involving the sale and accepting valuable consideration, arranging – for arranging the transaction, and the person arranging the sale is not licensed. And so what they're describing there is the actual engagement, an offer, acceptance, supported by consideration without a license.

And the facts that we have in this case, we have absolutely no evidence to indicate there was engaging in an offer, acceptance, without proper licensing, exchange of consideration. No sales were occurring in this case. There's been absolutely no evidence to suggest that any sales were occurring.

In dealing with the focus on the commercial speech, and I'll just continue the discussion on commercial speech and come back to the entertainment speech, the state is the party who has the burden of upholding the restriction on commercial speech and bears the burden of justifying it. In this case there has been no evidence to suggest that there was any misleading communication taking place in connection with this display of property.

There has been absolutely no evidence to indicate that there was anything improper going on other than the display of products, which the state asserts is subject to a blanket ban.

[493] The state bears the burden, and this is in the *Edenfield* case, 113 S.Ct., at 1800, *Edenfield v. Fane*, and the Lawyer's Edition is 123 L.Ed.2d 543. It's a 1993 case. The state must show that the harms are real and that the restriction in fact will alleviate them to a material degree. In *Edenfield*, the court, the U.S. Supreme Court, struck down the ban against direct in-person solicitation by CPAs. The restriction has to be in proportion to the interests that are being served.

In the *Board of Trustees of State University of New York*, which is the Tupperware case, it indicates that the display of product may be protected under the first amendment. The court points out there has to be a fit the legislative ends and the means chosen to accomplish those ends, and a blanket ban is an inadequate fit.

The Central Hanover case provides the balancing test – I'm sorry, the *Central Hudson Gas and Electricity*, which is 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343. And in that case the court held that if commercial speech is neither misleading nor related to unlawful activity, the government in seeking to regulate such speech must assert a substantial interest to be achieved by its restriction and employ a regulatory technique in proportion to that interest.

So they've got to have a narrowly-tailored regulation. The restriction must directly advance the state [494] interest involved and the regulation may not be sustained if it

provides only ineffective or remote support for the government's purpose.

Secondly, if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. And the second criteria is the restrictions be narrowly drawn.

In this instance, the sales of RVs is not unlawful. This is not a situation where we've got somebody trying to sell drugs or pornography or anything like that. And so what the state must do is identify the interest and the state bears the burden of justifying the restriction, and a blanket ban cannot be justified.

Additionally, with the entertainment aspect of what was going on, the state has to recognize the interest of what was occurring at the O'Loughlin show, and they have to recognize the impact of their activities on shutting down this display.

In the *Board of Regents v. Roth,* which was an employment due process case, the supreme court pointed out that when a state would directly impinge upon the interest of free speech or free press, this court has occasionally held that the opportunity for fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under the substantive first amendment [495] standards. Thus we have held, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. And this is at *Board of Regents v. Roth,* 33 L.Ed. 2d., at 560.

And so what we had here was a situation where the right of product display had been clearly established, that it is protected speech, and that the state has notice that it needs to be careful when it attempts to take that activity. We have a situation where they're essentially going in and shutting down the entire display without adequate justification, without adequate due process, and the state's own statute was not followed in this instance.

What they could have done, and the promoter has an interest in what was taking place at that show, even though it was directed at Lake City RV and not directly at the promoter, but the promoter had an interest in what was taking place, and if the state would have followed its statute, they could have had it reviewed at the director's level. And only then, if the director determined that an emergency existed, she could have issued an emergency cease and desist order. That did not happen in this instance.

Instead, you had Mr. Collins and Mr. Smith took it on themselves to charge in on this issue and order that the display be shut and locked. They gave an ultimatum which the [496] testimony indicates, viewed most favorably to the plaintiff, they didn't have the authority to order that shutting down. They're claiming that it was a request, and it's the plaintiff's submission that it was an order. But the need for hearing and the right for some due process was clearly established at the time that this action took place.

In the *Merit v. McKay* case, which is the one where an individual worked for a private drug and alcohol counseling center, was fired when state and federal officials

said get rid of this person or we'll cut off your state and federal funding, the court pointed out that because he had a contract relationship, in determining whether there is an entitlement to the benefit in question, you look to the constitutional law, you look to the state law.

In this instance, Mr. O'Loughlin had an enforceable contract with Lake City RV, he had a legitimate business expectancy, and he's entitled to due process before the state comes in and shuts down that display. That court held where the governmental intentionally injures or affects the legal status of a person by action directly taken against a private third person, is actionable. And that's where they use the language of setting in motion a series of events, and it points out that the post-deprivation remedies were not satisfactory.

It also went on to point out that because their [497] conduct exceeded the scope of their authority, and because they violated *Merit's* clearly established constitutional rights, because they acted knowingly outside the scope of their authority, they are not entitled to qualified immunity. In this case the court held that a reasonably competent public official is charged with knowledge of the law governing their conduct.

In the *Federal Deposit Guarantee Corporation v. Henderson*, the court pointed out that the action of setting in motion the constitutional injury gives rise to an action and they granted qualified immunity in that instance only because the termination right had not been clearly established. They point out government officials are charged with knowledge of constitutional developments

at the time of the alleged constitutional violation, including all available case law.

And they said that at that point in time the reason why qualified immunity was granted was because it was not clearly established that employment contracts containing both "for cause" and conditional "at will" termination provisions created a limited property exhibit.

In this situation we have it clearly established that there is enforceable contract expectancy between O'Loughlin and Lake City RV and the actions of shutting that down are contrary to law.

We additionally have clearly established and a long [498] line of speech cases that the display of product information, the publishing of prices is protected speech, and the actions that were taken were done without any thought to the protected speech issues of Lake City RV or O'Loughlin, and for that reason qualified immunity should be denied.

I view that the court has the ability to determine as a matter of law that the conduct of this trade show was protected speech. The fact that it is carried out by the trade show promoter does not deprive it of that speech. The fact that Mr. O'Loughlin is here in the best position to advocate these interests does not deprive the court or O'Loughlin of standing to address these issues concerning commercial speech.

I would urge the court that the unique situation of the Interstate Fairgrounds in Spokane, the testimony is that the market that is drawn from that Spokane area is Idaho, Montana, British Columbia, Alberta, Oregon, and

eastern Washington, and to say that there is no first amendment protection to activities being conducted in that trade show is contrary to established first amendment law.

Mr. O'Loughlin's situation is no different than that of a newspaper. In the *Signavision v. Burbank* case, 745 F.2d 560, the court points out again that it is in many instances only the theater owner or the book seller who can bring and protect the first amendment issue, points out the [499] fact that activities are engaged for profit does not deprive them of their first amendment protection. And the case clearly states, even though promoters generally promote concerts for profit, they still enjoy the protections of the first amendment.

And *Concerts Inc. v. City of Newport*, which is 453 U.S. 247, 101 S.Ct. 2748, a 1981 case, that case at the Supreme Court level principally dealt with the issue of striking down punitive damages against municipalities. But that was another promoter case. And the law was clearly established at this time that promoters enjoined first amendment protection, that commercial speech enjoined first amendment protection, and that there was a fundamental right of due process before you shut down somebody's commercial speech.

The *44 Liquor Mart* case, which was a case that dealt with the publishing of prices on alcohol as opposed to the alcoholic content, that case was decided after these events were concerned, so it does not provide them notice of what the standards were at the time they took the action that they did. But that case, in terms of a review, provides the clear outline that commercial speech was entitled to

first amendment protection and has been for many years. And it would be inappropriate to say that this issue is not settled.

I would agree that to my knowledge, I have not [500] found a case involving a trade show promoter and a display for profit in the course of a trade show, but the cases that are cited in the trial brief, the cases that I have discussed here today, make clear that the paternalistic approach taken by the state in this instance cannot withstand additional scrutiny.

In the 44 *Liquor Mart* case the court pointed out in the *Virginia Pharmacy Center v. Consumer Council, Inc.*, which is one of the fundamental commercial speech cases, that the state's blanket ban on advertising the price of prescription drugs violated the first amendment. *Virginia Pharmacy Board* reflected the conclusion, the same interests that support regulation of potential automatically misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the first amendment that provides constitutional protection for the dissemination of accurate non-misleading commercial messages.

Then they go into the discussion of advertising, however tasteless and excessive it sometimes may seem, nonetheless, the dissemination of information as to who is producing and selling what product, for what reason and at what prices, so long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous economic decisions. It is a matter of public

interest that those decisions in the aggregate be intelligent and well formed. To this end, the [501] free flow of commercial information is indispensable.

And then the opinion goes on to strike down the paternalistic approach in those places, and it's inappropriate for the state to assume that the people will not perceive their own business interest if only – I'll just read the whole –

THE COURT: I'm going to take my break. Do you have much more before our afternoon recess? We've been here for an hour and 45. I'm sure the reporter needs his break. So if you have one more minute, we'll finish before the break. If you have ten more minutes, we're going to take our break.

MR. WOOSTER: I have ten more minutes.

THE COURT: Okay.

MR. WOOSTER: Actually not ten, but not one either.

THE COURT: If I could read the *Merit* case, I'm going to read that and the *Hairston* case during my recess.

(Recess taken)

(Discussion off the record)

IN THE SUPERIOR COURT OR THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

---

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,<br><br>Plaintiff,<br><br>vs.<br><br>GRANT COLLINS and MARY RIVELAND in her Official Capacity as the Director of the Department of Licensing, the Department of Licensing, the State of Washington, and JOHN DOES 1 thru 5,<br><br>Defendants. | Superior Court<br>No. 95-2-03283-1<br>Court of Appeals<br>No. 23126-3-II |

---

VERBATIM REPORT OF PROCEEDINGS
(Volume 7)

BE IT REMBERED that on the 9th day of March, 1998, 3:30 p.m., the above-entitled and numbered cause came on for hearing before the Honorable **Paula Casey**, Judge, Thurston County Superior Court, Olympia, Washington.

* * *

[568] March 9, 1998 Olympia, Washington

AFTERNOON SESSION

Department 2 Hon. Paula Casey, Presiding

(Appearances as heretofore noted.)

(The following proceedings reported by Monica Jean Mestas; Michael Jay reported earlier proceedings.)

--o0o--

THE COURT: Court is back in session. We'll start before the clerk comes in. My court reporter actually had a 4:00 appointment.

MR. WOOSTER: Again, I would refer the court to the liquor matter case because of the history that it sets out of the rights of states to regulate commercial speech and in particular the limitations on those rights and the historical perspective; and in view of what took place here, the teachings of that case are very important in that the state does not have the right to issue blanket bans, and the fact that the commercial speech by its very nature is intertwined with proposals of commercial transactions, that it is nevertheless entitled to full protection under the Constitution and that the regulations that suppress the truth are no less troubling because they target objectively verifiable [569] information, nor are they less effective because they aim at durable messages.

Commercial speech bans hinder not only consumer choice but that they impede the debate over central issues of public policy and that the first amendment directs us to be skeptical of regulations. They seek to keep people in

the dark for what the government perceives to be their own good.

Commercial marketplace like other spheres of social and cultural life provide a forum where ideas and information flourish. Some of the ideas and information are vital and some are of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even communication that does no more than propose on commercial transactions is entitled to the coverage of the first amendment. And it's citing the 1970s case of *Virginia Board of Pharmacy* and *Edinfield v. Fane* that was cited earlier to the court.

In view of the long history of cases protecting both in general and entertainment and shows of the nature of this, product demonstration being entitled to demonstration under the first amendment, that the action taken in this case was action that affected the first amendment interest; that the due process rights of [570] O'Loughlin Enterprises, as well as Lake City R.V. were also clearly established, established to the point that they were spelled out in the state statute that was at issue here, and that they weren't followed and that injury resulted from it. And I would request that the court deny each of the motions.

I also raised an issue of judicial estoppel based on the state's earlier position in this case, and I'll provide the court with two cites to that doctrine. *Allen v. Ciric*, 667 F.2d, 1162. That's a 1986 Fourth Circuit case. And *Stevens Tech Inc. v. S. S. Brooklyn*, 885 F.2d 584, and that's a Ninth Circuit, 1989 case. And essentially the doctrine of judicial

estoppel, as the court is aware, prohibits a party from taking a position that is inconsistent and then flip flopping and coming forward with the opposite of that position after they've gotten from the court what they want in one setting and then changing the position later.

(The clerk entered the courtroom.)

THE COURT: I actually haven't heard of judicial estoppel before but . . .

MR. WOOSTER: Okay.

THE COURT: At least by its name. Mr. Tomisser.

MR. TOMISSER: A couple of points that I want to respond to in this argument, your Honor. First of all,

* * *

[577] THE COURT: I just have a couple of questions: Qualified immunity has been raised for the first time at trial. Is that right?

MR. TOMISSER: That's right. Well, it was raised in my answer actually.

THE COURT: But it hasn't been argued previously.

MR. TOMISSER: No, it has not.

THE COURT: And is it your theory that the doctrine of qualified immunity applies just to the constitutionality claims of the plaintiff or to the tort claim as well?

MR. TOMISSER: The doctrine of qualified immunity only applies to the civil rights claims. That is

only related to constitutional theories. There is such a – it gets confusing because there is such a thing called qualified immunity in state law. But it's totally different.

THE COURT: Okay.

MR. TOMISSER: Final point: If this court finds, I believe, that – and I think that – if this court finds that Lake City R.V. was engaged in business in violation of the statute, then the state law claim for tortious interference also has to be dismissed because you cannot have a valid business expectancy with [578] a party who is in violation of the law.

I think that Mr. Wooster's suggestion to this court that the fact that we do not have evidence presented of an offer and a sale and therefore we do not have evidence of engaging in business is simply too narrow a definition.

The conduct of business, as we've heard from these witnesses and I think from plain common sense, is much broader than the final act of a commercial transaction which may culminate in an offer and acceptance being made. Engaging in business is a much broader proposition than that. That's all I have, your Honor.

THE COURT: I'm going to address these motions in the opposite order from which they were presented. And so I'm going to address first the state's motion to dismiss the plaintiff's first amendment and civil rights claims.

I think that I have made it clear to counsel along the way that I think that the issues presented by this case in the absence of Lake City R.V.'s participation as a party are extremely complex; and the constitutional issues

become very intertwined; and all of the constitutional issues cannot be resolved, as I've announced before, because Lake City R.V. is not a party to these proceedings.

[579] The plaintiffs have alleged that because the plaintiff is in the entertainment industry, he can raise first amendment issues, as he is affected by the state's action against Lake City R.V. in this instance. The plaintiff, as I understand it, alleges that as a promoter, he has the right to promote commercial speech by the displays at trade shows, and the state has improperly regulated that commercial speech in this instance.

And the state argues that even if it were so, that the state has regulated commercial speech, that the plaintiff's argument for damages under the Civil Rights Act is going to fall because the state would have qualified immunity.

It is my understanding that if the law is not settled or if it cannot be easily and directly inferred from the development of constitutional law principles to date that the prohibition of unlicensed out-of-state dealers from displaying recreational vehicles at an in-state trade show is unconstitutional, then the state has qualified immunity for the actions taken at this trade show. And I think that it cannot be seriously disputed that this area of the law is not well settled.

At the time of the summary judgment motions at the beginning of this trial throughout the several days that [580] we have been involved in this trial, I think none of us, the lawyers or me as the judge, have really been able to even define very clearly the issues that are presented by this case in terms of these free speech arguments or

the due process arguments as they are related to the 1983 actions.

Now, there are some constitutional implications of what took place at the Spokane R.V. show in 1994 relative to Lake City that may in fact be well settled under principles of commercial clause analysis or under strict principles of due process as related to Lake City R.V. and Lake City R.V.'s right to have a hearing before being closed down.

But the plaintiff, I have earlier determined, does not have standing to raise the commerce clause issues and, I'll announce now, would not have standing to raise those due process issues related directly to Lake City R.V. So the court never reaches the question of whether there are settled principles under those laws that may have precluded the state from taking the action which it did. So accordingly, I will find that plaintiff's 1983 actions shall be dismissed.

Now, I'm not going under the tortious interference questions yet because I'd like to just have a little bit more discussion about the constitutional issues raised.

[581] By having ruled that the 1983 actions fail, that means there are no damages that flow from any constitutional violations that may have occurred, and the constitutional violations we're talking about are still the First Amendment violations.

But those First Amendment issues still are properly before the court for a final resolution to determine whether the state's enforcement action and its regulation by statute is in fact in violation of the First Amendment.

And I think that it is important that counsel receive a final decision on those issues because of the importance of appealing these issues ultimately.

And so, you know, I had previously on summary judgment made some rulings with respect to the validity of the statute. And I assume that counsel also want the court to make some final determinations with respect to the validity of the state's action with respect to the constitutional claims. This is not for purposes of establishing damages but for purposes of establishing the law for the future. Is that right?

MR. TOMISSER: I'm not sure that it is, your Honor. And you caught me off guard to propose this. My thought at this juncture on the proper procedural posture of this is I believe the courts, when they have looked at this issue – and I have seen it [582] talked about in a number of cases where a court is considering the qualified immunity – and a number of times what the courts have done is say assuming, without deciding, that a constitutional violation may have occurred, I'm going to find that the state of the law at the time was not sufficiently clear so I'm going to grant qualified immunity, and you don't actually get a specific ruling on the constitutionality. And I'm wondering if that might not be –

THE COURT: Well, I have certainly done that with respect to the 1983 claims. But it's my understanding that the underlying lawsuit is broader than that. For the purposes of our jury, those are the only issues that need to be answered with respect to the constitutional claims.

But the underlying lawsuit challenges the ability of the state to prohibit unlicensed out-of-state R.V. dealers

from displaying their vehicles at R.V. shows within the state. And I think that the underlying lawsuit demands an answer to that question. Does it not?

MR. WOOSTER: That's correct, your Honor. It addresses the issues under 42 USC Section 1493. It also seeks declaratory judgment on certain issues; and included within those issues that we're seeking [583] declaratory judgment on, what is the scope of the limitation on the state's right to regulate trade shows and the display of products in the trade shows where no sales are occurring?

THE COURT: I'm sensing, Mr. Tomisser, that your concern is kind of the phase of proceedings at which this question is being answered rather than the fact that it is an appropriate answer to be rendered in this lawsuit – or an appropriate question to be answered.

MR. TOMISSER: I understand the court has dismissed the 1983 claims. So as far as what my clients are exposed to in damages in this case – and you haven't ruled on this other part yet – but at this point the state – the tortious interference claim you have not yet addressed and we'll see what you have to say about that.

But the plaintiff early on in this case did bring a motion for injunctive relief that was denied by Judge McPhee. A declaratory judgment was attempted and denied. So I think we have a ruling on that.

THE COURT: But that was –

MR. WOOSTER: The record – he denied it pending the creation of the record.

THE COURT: I think that's correct. We can look back. So you don't want me to rule on that today, in [584] any case. And that's fine. But I'm just announcing to you that – we can look back to make sure that I haven't been precluded from answering it by an earlier decision in this case. But I think that that question has to be answered as part of this lawsuit. But it is a question for the court; it's not a question for the jury.

MR. WOOSTER: That's correct.

MR. TOMISSER: And you'll provide an opportunity for briefing separately on declaratory judgment? Or are you going to be prepared to rule based upon what you've seen?

THE COURT: I think that you have totally briefed and argued this issue already, I think, because –

MR. WOOSTER: Yes.

THE COURT: At least the plaintiff certainly has. You're only – you have other arguments other than the qualified immunity argument. You've outlined your two arguments today and I have just chosen qualified immunity as a way of disposing of the 1983 action.

MR. TOMISSER: All right.

THE COURT: And I'm prepared to announce it right now. And I guess what I need to figure out is if I need to announce that answer as a precursor to the tortious interference analysis.

[585] MR. WOOSTER: Probably.

MR. TOMISSER: Well, not necessarily.

MR. WOOSTER: It would give us guidance.

MR. TOMISSER: If the only question that is going to go to this jury, if the court is going to allow that claim to proceed to the jury, which since you're even considering it, I assume you are – if the jury is only going to be asked did – has the state – "Has there been some sort of a privilege involved," the jury wouldn't need to know anything about whether or not there was First Amendment activity, if this court has dismissed the 1983 claim. I would be concerned that there would be some prejudice flowing from it.

THE COURT: The jury doesn't need to know it. But do I need to announce that before I can analyze the tortious interference motions that are before me?

MR. WOOSTER: My feeling is it would be helpful. I mean, if the court has reached some decisions, it may narrow what we're faced with. I think it would be helpful. I can't see what harm could arise from knowing the court's rulings now as opposed to later.

THE COURT: I think I – I think it's helpful to announce it now. And you both have argued it fully. Well, I guess what I've announced so far is that the law is not settled on whether displaying at a trade show [586] is any kind of protected commercial speech. I haven't had to reach that question yet. And I have determined that that at least is not settled in the law.

And I will also state that it is not determined, has not been determined yet, whether displaying at a trade show is engaging in business, as defined – or as contemplated by the Department of Licensing regulation.

What I'm prepared to announce are the answers to both of those questions as part of this case. You know, the answers to neither question are well settled or determined in previous case law, in my opinion. But both of those questions should be answered in the course of this case.

And here are the answers: I'm going to find that displaying products at a trade show where the products are physically present with the public is engaging in business and is engaging in business as contemplated by the Department of Licensing regulations or statutes.

And accordingly – I guess not accordingly but – so I'm going to find that the Department does have authority to regulate exhibitors who are engaged in business at trade shows; and in doing so, they may be involved in incidentally regulating speech.

And the analysis is, Do the regulations bear a rational relationship to the government's purpose in [587] regulating the motor vehicle industry in this case? And I'll find that they do; and I will find that there may be problems with regulations but the problems with the regulations are not problems related to the infringement of free speech.

And so I'm going to find that – I've already found that the regulation on its face is not a violation of the First Amendment. Now I'm going to find that, as applied, it's not a violation of the First Amendment.

So what I think that does is I think that ruling precludes the ultimate question regarding tortious interference from going to the jury because if in fact Lake City

R.V. was being properly regulated, there was no constitutional violation in the regulation, then the plaintiff should have had no business expectancy with respect to its relationship with allowing Lake City R.V. to display at that trade show.

Now, we're coming to these conclusions at the end of six days of trial and we have a jury here who's heard a lot of facts, and I recognize, as well as Mr. Wooster does, that some other court may disagree with me on several of the decisions that I've made today. So I think it is very important that we figure out what factual issues may be important to have as part of our record, so that while we have the trier of fact here, [588] the trier of fact makes those determinations which may be important on appeal. I don't think they're important here but they may be important on appeal.

So do counsel want to think about that for a few minutes so we can be off the record and just kind of see where we are?

(Discussion held off the record.)

(Proceedings concluded.)

**THE SUPREME COURT OF WASHINGTON**

TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,

Petitioner,

v.

GRANT COLLINS and KATHY BARROSFRIEDT, in her official capacity as the Director of the Department of Licensing, THE STATE OF WASHINGTON and ROBERT SMITH, and JOHN DOES 1 Through 5,

Respondents.

NO. 69753-1

**ORDER DENYING MOTION FOR RECONSIDERATION**

(Filed Oct. 18, 2001)

---

The Court having considered the Petitioner's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Petitioner's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 18th day of October 2001.

/s/ Gerry L. Alexander
CHIEF JUSTICE

**1. Constitutional Provisions and Statutes Involved in this Case.**

**a. United States Constitutional Provisions.**

**i. First Amendment. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

**ii. Fourteenth Amendment. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

. . . .

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

**b. Federal Statutes**

**i. 42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

---

**c. Washington State Statutes**

**i. Wash. Rev. Code 46.70.021 Licenses Required for dealers or manufacturers – Penalties.**

It is unlawful for any person, firm, or association to act as a vehicle dealer or vehicle manufacturer, to engage in business as such, serve in the capacity of such, advertise himself, herself, or themselves as such, solicit sales as such, or distribute or transfer vehicles for resale in this state, without first obtaining and holding a current license as provided in this chapter, unless the title of the vehicle is in the name of the seller. It is unlawful for any person other than a licensed vehicle dealer to display a

vehicle for sale unless the registered owner or legal owner is the displayer or holds a notarized power of attorney. A person or firm engaged in buying and offering for sale, or buying and selling five or more vehicles in a twelve-month period, or in any other way engaged in dealer activity without holding a vehicle dealer license, is guilty of a gross misdemeanor, and upon conviction is subject to a fine of up to five thousand dollars for each violation and up to one year in jail. A second offense is a class C felony punishable under chapter 9A.20 RCW. A violation of this section is also a per se violation of chapter 19.86 RCW and is considered a deceptive practice. The department of licensing, the Washington state patrol, the attorney general's office, and the department of revenue shall cooperate in the enforcement of this section. A distributor, factory branch, or factory representative shall not be required to have a vehicle manufacturer license so long as the vehicle manufacturer so represented is properly licensed pursuant to this chapter. Nothing in this chapter prohibits financial institutions from cooperating with vehicle dealers licensed under this chapter in dealer sales or leases. However, financial institutions shall not broker vehicles and cooperation is limited to organizing, promoting, and financing of such dealer sales or leases.

**ii. Wash. Rev. Code 46.70.023 Place of Business.**

46.70.021. License required for dealers or manufacturers – Penalties

It is unlawful for any person, firm, or association to act as a vehicle dealer or vehicle manufacturer, to engage in business as such, serve in the capacity of such, advertise himself, herself, or themselves as such, solicit sales as such, or distribute or transfer vehicles for resale in this state, without first obtaining and holding a current license as provided in this chapter, unless the title of the vehicle is in the name of the seller. It is unlawful for any person other than a licensed vehicle dealer to display a vehicle for sale unless the registered owner or legal owner is the displayer or holds a notarized power of attorney. A person or firm engaged in buying and offering for sale, or buying and selling five or more vehicles in a twelve-month period, or in any other way engaged in dealer activity without holding a vehicle dealer license, is guilty of a gross misdemeanor, and upon conviction is subject to a fine of up to five thousand dollars for each violation and up to one year in jail. A second offense is a class C felony punishable under chapter 9A.20 RCW. A violation of this section is also a per se violation of chapter 19.86 RCW and is considered a deceptive practice. The department of licensing, the Washington state patrol, the attorney general's office, and the department of revenue shall cooperate in the enforcement of this section. A distributor, factory branch, or factory representative shall not be required to have a vehicle manufacturer license so long as the vehicle manufacturer so represented is properly licensed pursuant to this chapter. Nothing in this chapter prohibits financial institutions

from cooperating with vehicle dealers licensed under this chapter in dealer sales or leases. However, financial institutions shall not broker vehicles and cooperation is limited to organizing, promoting, and financing of such dealer sales or leases.

(1) An "established place of business" requires a permanent, enclosed commercial building located within the state of Washington easily accessible at all reasonable times. The business of a vehicle dealer must be lawfully carried on at an established place of business in accordance with the terms of all applicable building code, zoning, and other land-use regulatory ordinances. A vehicle dealer may display a vehicle for sale only at its established place of business, licensed subagency, or temporary subagency site, except at auction. The dealer shall keep the building open to the public so that the public may contact the vehicle dealer or the dealer's salespersons at all reasonable times. The books, records, and files necessary to conduct the business shall be kept and maintained at that place. The established place of business shall display an exterior sign with the business name and nature of the business, such as auto sales, permanently affixed to the land or building, with letters clearly visible to the major avenue of traffic. A room or rooms in a hotel, rooming house, or apartment house building or part of a single or multiple-unit dwelling house may not be considered an "established place of business" unless the ground floor of such a dwelling is devoted principally to and occupied for commercial purposes and the dealer offices are located on the ground floor. A mobile office or mobile home may be used as an office if it is connected to utilities and is set up in accordance with state law. A

state-wide trade association representing manufactured housing dealers shall be permitted to use a manufactured home as an office if the office complies with all other applicable building code, zoning, and other land-use regulatory ordinances. This subsection does not apply to auction companies that do not own vehicle inventory or sell vehicles from an auction yard.

(2) An auction company shall have office facilities within the state. The books, records, and files necessary to conduct the business shall be maintained at the office facilities. All storage facilities for inventory shall be listed with the department, and shall meet local zoning and land use ordinances. An auction company shall maintain a telecommunications system.

(3) Auction companies shall post their vehicle dealer license at each auction where vehicles are offered, and shall provide the department with the address of the auction at least three days before the auction.

(4) If a dealer maintains a place of business at more than one location or under more than one name in this state, he or she shall designate one location as the principal place of business of the firm, one name as the principal name of the firm, and all other locations or names as subagencies. A subagency license is required for each and every subagency: PROVIDED, That the department may grant an exception to the subagency requirement in the specific instance where a licensed dealer is unable to locate their used vehicle sales facilities adjacent to or at the established place of business. This exception shall be granted and defined under the promulgation of rules consistent with the Administrative Procedure Act.

(5) All vehicle dealers shall maintain ownership or leasehold throughout the license year of the real property from which they do business. The dealer shall provide the department with evidence of ownership or leasehold whenever the ownership changes or the lease is terminated.

(6) A subagency shall comply with all requirements of an established place of business, except that subagency records may be kept at the principal place of business designated by the dealer. Auction companies shall comply with the requirements in subsection (2) of this section.

(7) A temporary subagency shall meet all local zoning and building codes for the type of merchandising being conducted. The dealer license certificate shall be posted at the location. No other requirements of an established place of business apply to a temporary subagency. Auction companies are not required to obtain a temporary subagency license.

(8) A wholesale vehicle dealer shall have office facilities in a commercial building within this state, and all storage facilities for inventory shall be listed with the department, and shall meet local zoning and land use ordinances. A wholesale vehicle dealer shall maintain a telecommunications system. An exterior sign visible from the nearest street shall identify the business name and the nature of business. When two or more vehicle dealer businesses share a location, all records, office facilities, and inventory, if any, must be physically segregated and clearly identified.

(9) A retail vehicle dealer shall be open during normal business hours, maintain office and display facilities

in a commercially zoned location or in a location complying with all applicable building and land use ordinances, and maintain a business telephone listing in the local directory. When two or more vehicle dealer businesses share a location, all records, office facilities, and inventory shall be physically segregated and clearly identified.

(10) A subagency license is not required for a mobile home dealer to display an on-site display model, a consigned mobile home not relocated from its site, or a repossessed mobile home if sales are handled from a principal place of business or subagency. A mobile home dealer shall identify on-site display models, repossessed mobile homes, and those consigned at their sites with a sign that includes the dealer's name and telephone number.

(11) Every vehicle dealer shall advise the department of the location of each and every place of business of the firm and the name or names under which the firm is doing business at such location or locations. If any name or location is changed, the dealer shall notify the department of such change within ten days. The license issued by the department shall reflect the name and location of the firm and shall be posted in a conspicuous place at that location by the dealer.

(12) A vehicle dealer's license shall upon the death or incapacity of an individual vehicle dealer authorize the personal representative of such dealer, subject to payment of license fees, to continue the business for a period of six months from the date of the death or incapacity.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
SPOKANE COUNTY

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,<br><br>Plaintiffs,<br><br>v.<br><br>GRANT COLLINS and MARY RIVELAND In her Official Capacity as the Director of the Department of Licensing, The Department of Licensing, the State of Washington, and JOHN DOES 1 THRU 5<br><br>Defendants. | NO. 95201225-1<br><br>COMPLAINT AND JURY DEMAND<br><br>(Filed March 6, 1995) |

**PARTIES**

1.1 Plaintiff O'Loughlin Trade Shows, is an Oregon Corporation licensed to do business in the State of Washington, having its principal place of business in Tacoma, Pierce County, Washington.

1.2 Defendant Grant Collins is an investigator for the Department of Licensing and is believed to be a resident of Spokane County. Defendant Collins is being sued in both his offical [sic] capacity and individually.

1.3 Defendant Mary Riveland is the Director of the State of Washington Department of Licensing and is

believed to be a resident of Thurston County. Defendant Riveland is being sued in her official capacity as Director of the Department of Licensing.

1.4 The State of Washington is a real party in interest in that the declaratory portion of this lawsuit addresses a licensing statute.

1.5 Defendant Department of Licensing is an agency of the State of Washington.

1.6 The "JOHN DOE" defendants are those officials of the Department of Licensing who participated in the April 8, 1994 meetings referred to herein.

## JURISDICTION AND VENUE

2.1 Plaintiff is seeking both monetary relief and declaratory relief and this court has jurisdiction and venue pursuant to RCW 4.12.020(2); RCW 4.92.010; and RCW 7.12.010.

## FACTUAL BACKGROUND

3.1 O'Loughlin Trade Shows sponsors various trade shows throughout the Western United States, including within Washington state. Included among the Trade Show sponsored by O'Loughlin Trade Shows are recreational vehicle (RV) trade shows, including the RV trade show out of which this claim arises.

3.2 On April 7th through April 10, 1994, O'Loughlin Trade Shows sponsored the Spokane Spring RV Show at the fairgrounds in Spokane, Washington, O'Loughlin

Trade Show earns income from leasing space to Exhibitors and off of the attendance fees paid by persons attending the trade show.

3.3 Exhibition space was rented by Lake City RV who conducts business at 425 East Borah, Coeur d'Alene, Idaho 83814. Lake City RV is the only Prowler, Savannah, Westport and Avion dealer for all of Spokane and Coeur d'Alene. The presence of Lake City RV models from the above referenced manufacturers at the Spokane Spring RV Show was a considerable attraction for Spokane area RV enthusiasts and a major attendance draw for the event. The participation of Lake City RV afforded Spokane area residents the opportunity to inspect products that are not available in their City.

The RVs that were exhibited by Lake City displayed signage indicated that they were for display purposes only and were not for sale. The dealer representatives would not take orders for these vehicle at the show and directed further inquiries from interested consumers to their show room in Idaho. The Department of Licensing has had knowledge of this practice and has approved the presentations of vehicles from out of state dealers for a period of many years at numerous shows throughout Washington state.

3.4 Additionally, these Recreational Vehicles had received valid stickers from the Department of Labor and Industries that they were inspected and approved for use in Washington State.

3.5 The presence of Lake City RV at the O'Loughlin Spokane Spring RV Show was objected to by local Spokane dealers, the Spokane Recreational Vehicle

Dealers' Association (SRVDA). These dealers were promoting a rival show at the U-City Shopping Center on the same dates as O'Loughlin Trade Show's Spokane Spring RV Show. The SRVDA expelled one member from their organization who rented exhibition space at the O'Loughlin Spokane Spring RV Show. The SRVDA contacted the Department of Licensing investigator, Grant Collins and Lee Jensen, Inspector, Department of Labor and Industries persuaded them to use their official positions to impact the O'Loughlin Spokane Spring RV Show and prevent competing products from being displayed or advertised in the State of Washington. On April 5, 1994 Lake City RV personnel were setting up at the Fair grounds for the show. At approximately 10:30 a.m., Grant Collins from the Department of Licensing informed Richard Foster of Lake City RV that he was in violation of Washington State Law and issued Lake City RV a violation report No. 52940402 which was dated April 4, 1994.

3.7 On April 6, 1994, Richard F. Foster from Lake City RV received a telephone call from a John Harvey from the Department of Licensing in Olympia. Mr. Harvey was responding to a certified letter from Lake City RV dated March 31, 1994. During the telephone conversation Mr. Harvey agreed to allow Lake City RV to participate in the RV show with the understanding that all units would have a visible sign stating that they are for display purposes only; no price quotes would be given and that prior to participation in any other activities in the State of Washington Lake City RV would obtain a dealer's license for the state and have all units tagged appropriately. Lake City RV agreed to, and did comply with all of the restrictions imposed by Mr.

Harvey. It was understood by Mr. Foster and the representatives of O'Loughlin Trade Shows that the matter was resolved.

3.8 On Thursday, April 7, 1994, the show opened for the first day. Mr. Lee Jensen, and inspector from the Department of Labor and Industries approached Mr. Foster and inquired if a particular unit in the display from Lake City RV was for sale. Mr. Jensen did not, at that time, identify himself as a state official. When Mr. Foster told him that the unit was not for sale and started to give the explanation as to why, he was rudely interrupted by Mr. Jensen and told to follow him to the show promoter's office. Once inside the show office, Mr. Jensen began ranting and raving, cursing and being very rude. Mr. Jensen stated on no uncertain terms that he did not like it one bit that this company had products on display at the show in Spokane. When it was explained to Mr. Jensen that Lake City RV had authorization to be at the show for display purposes only, Mr. Jensen became even more upset. He stated to Mr. Foster and representatives from the O'Loughlin Trade Show, that "he had several Spokane dealers standing outside the building that were very upset and that we were causing political problems." Mr. Jensen then got on the phone to call his superiors in Olympia. When he got off the phone having learned that the vehicles in question were approved for display within Washington State he again stated, "He did not like it," and stormed out of the office saying nothing further to the show promoters or Mr. Foster.

3.9 On Friday, April 8, 1994, approximately 3:15 p.m. Grant Collins, from the Department of Licensing returned to the Lake City RV display and instructed Mr.

Foster to join him in the promoter's office. Once inside the promoters office, Mr. Collins informed Mr. Foster that there had been a "special meeting" conducted in Olympia on the morning of Friday, April 8, regarding the Lake City RV display and the Spokane Spring RV Show conducted by O'Loughlin Trade Shows. Mr. Collins informed Mr. Foster that as a result of that meeting, Mr. Collins was to lock Mr. Foster out of the Lake City RV unit and all Lake City RV personnel were to vacate the premises.

3.10 When Robert O'Loughlin of O'Loughlin Trade Shows attempted to contact Mr. Collin's suprvisor, Robert Smith, Mr. Collins quickly exited the promoters's office and used the pay phone outside to contact Mr. Smith ahead of Mr. O'Loughlin. Mr. Collins then returned and informed Mr. O'Loughlin that he had just spoken with Mr. Smith on the pay phone and Mr. Collins had instructed Mr. Smith not to return Mr. O'Loughlin's call. Mr. Smith did not speak with or return Mr. O'Loughlin's call. By waiting until late in the afternoon on Friday to inform the promoters of this purported position taken by the Department of Licensing the show promoters were precluded from discussing the issue with Department of Licensing Officials in Olympia or seeking injunctive relief from the Courts. Mr. Collins was aware the effect of closing a substantial portion of the exhibition would have on the promoters over the weekend and calculated his efforts to maximize that damage.

3.11 Mr. Collins informed Mr. Foster that if he did not lock up all of the units and leave the premises he would be subject to a minimum of $10,000 fine and that he could go to jail. Subsequently, that afternoon, Lake City RV locked up all of the units and all Lake City RV

employees and their factory representatives left the Fairgrounds. All of the units remained locked up throughout the weekend until Monday, April 11, 1994 when they were removed from the Fairground and brought back to the Lake City RV lot.

3.12 Throughout his contact with representatives of O'Loughlin Trade Shows and Lake City RV Mr. Collins adopted a hostile and intimidating demeanor. At one point, Mr. Collins stated to two factory reps in the show office who had produced their factory authorization numbers to show that they could display vehicles within Washington state, Mr. Collins threatened them. The factory rep stated to Mr. Collins in front of others they were representatives of large factories and should be permitted to display their products within Washington state. Mr. Collins replied, "I could just take out a gun and shoot you and it would not be a problem then." This threatening comment was made in front of Rick Shanaman and Bob O'Loughlin, both of O'Loughlin Trade Shows and Pete Vail of Foretravel Northwest, Scott DeGran and Rick Combs of Fleetwood Travel Trailers of Oregon.

3.13 When Mr. Collins was asked by Mr. O'Loughlin and others regarding whether he was going to be doing any inspection of the Spokane RV Association Dealers Show that was being conducted at another location in the Spokane area, he stated that he was not going to inspect that site. He stated that he knew all of those dealers, that he did not want to ruffle their feathers and that they would just hassle him about the Spokane RV Show put on by O'Loughlin Trade Shows if he went out to inspect their facilities.

3.14 Mr. Collins has used his position as an official of the State to deprive O'Loughlin Trade Shows of its federally protected constitutional rights and tortiously interfered with its business relations. If in fact, a meeting was held at the Department of Licensing on the morning April 8, 1994, those officials of the Department of Licensing who ordered Lake City RV to close its units which were set out for display purposes only at the O'Loughlin Trade Show's Spokane Spring RV Show violated The First Amendment, the Commerce Clause and the Equal Protection Clause of the Federal Constitution in an act of protectionism designed to further the interest of the Spokane Recreational Vehicle Association. Such acts were taken under of color of law and tortiously interfered with O'Loughlin Trade Shows' rights of contract. A reasonable public official in Mr. Collins' position and in the Olympia Office of the Department of Licensing would know that their conduct of enforcement of the law requiring a Dealer's License for entities displaying their products within the State, but not offering them for sale is contrary to the anti-protectionist sweep of the Commerce Clause of the Federal Constitution. Further, a reasonable public official is aware that the enforcement of laws cannot be carried out in a selective and discriminatory manner with the intent and effect of injuring the contractual and competitive positions of citizens or to promote the interests of one group over another.

3.15 As a result of the actions of Mr. Collins and his superiors in the Department of Licensing O'Loughlin Trade Shows was forced to go to a free gate on Friday, April 8, 1994 and to reduce their admission on Saturday and Sunday from $3.00 per person for adults, $2.00 per

person for seniors and juniors, to $1.00 per person or $3.00 per family on Saturday and Sunday. Saturday and Sunday typically produce the largest revenues for the show promoters. Additionally, O'Loughlin Trade Show, had to refund the $4800 paid by Lake City RV to rent exhibition space at the show. Many customers who came to view the products of Lake City RV demanded a refund when they learned that the products promoted by Lake City RV were not available for inspection. As a result of the adverse publicity generated in the local press as a result of Mr. Collins' expulsion of Lake City RV from the Spokane Spring RV Show both O'Loughlin Trade Shows and Lake City RV suffered damage to their reputation in the Spokane area. This issue has been mentioned to representatives of O'Loughlin Trade Show by virtually every exhibitor. This action will have future impact on O'Loughlin Trade Show's ability to promote RV shows in the Spokane area.

3.16 In May and June of 1994, Robert O'Loughlin and his attorney attempted to meet with representatives of the Department of Licensing and the Department of Labor and Industries to obtain clarification of the Departments' interpretation of the legislation, he was informed they would not meet with him if his attorney was present. Subsequently, a meeting with [sic] held with Mr. O'Loughlin and Mr. John Harvey of the Department of Labor and industries and Mr. Guy Baker of the Department of Licensing in Olympia on June 15, 1994. The purpose of the meeting was to address clarification of Washington State's interpretation of the regulations and to seek uniform application of the regulations for all shows and show promoters within the State. Currently,

the law is being enforced in a discriminatory and non-uniform matter through out the State. The position of the Department of Licensing is that no uniform interpretation of the law could be rendered and the six regions of the State will interpret the regulation in its own way. Further clarification of the statute is a low priority for the Department.

3.17 The conduct of Mr. Collins and his supervisors in the Department of Licensing in their interpretation and enforcement of RCW 46.70.021 was done in bad faith, is contrary to law, violates the first Amendment, the commerce and Equal Protection clauses of the United States Constitution and was taken under color of law and establishes a violation of 42 U.S.C. § 1983 and tortious interference with business relations.

3.17 The Department of Licensing has selectively targeted O'Loughlin Trade Shows and its exhibitors for enforcement of RCW 46.70.021 and fails to enforce the statute against out of state dealers and distributors who advertise in print, radio or television media or other show promoters promoting RV shows outside the Spokane area.

3.18 The conduct of the representatives of the Department of Licensing violated specific requirements of the Department of Licensing Code of Ethics for Department employees, and establishes a violation of 42 USC § 1983. The conduct of Grant Collins and representatives of the Department of Licensing amounts to tortious interference with business relations.

3.19 The Family Motor Coach Association (FMCA) conducted a rally at the Puyallup Fairgrounds on August

2 through 4 of 1994. At that rally, manufacturers and dealers from all over the country were permitted to sell products without RV sales licenses or green code tags issued by the Department of Labor and Industries.

3.20 The State of Washington has indicated that they entered into a special agreement with FMCA permitting them to conduct this rally and authorized sales without obtaining a Washington state RV Dealers License.

3.21 The Department of Licensing enforces its laws in a nonuniform manner throughout the regions of the state.

3.22 A special meeting was held at the Office of the Department of Licensing in Olympia on or about April 8, 1994, wherein it was determined grant Collins would shut down the Lake City RV display and exclude these clients of plaintiff from the Fairground premises.

## FIRST CAUSE OF ACTION

4.1 Plaintiff realleges all allegations of paragraphs 1.1 through 3.21 as though set forth fully herein.

4.2 The conduct of Defendant Collins and defendant Riveland establish a violation of 42 USC § 1983.

4.3 The conduct of Defendant Collins amounts to tortious interference with business relations.

4.4 The conduct of Defendant Riveland and the Department of Licensing, in their interpretation and enforcement of RCW 46.70.021 is undertaken in bad faith, is contrary to law, and violates the First Amendment,

Commerce and Equal Protection Laws of the United States Constitution.

WHEREFORE, the Plaintiff prays for the following relief:

1. Declaratory judgment declaring the provisions of RCW 46.70.021 unconstitutional to the extent that prohibits advertisement within the State of Washington unless the advertiser is a licensed recreational vehicle dealer within the state.

2. For general and special damages in an amount to be proven at the time of trial.

3. For costs and attorney's fees pursuant to 42 USC § 1988.

4. That these pleadings be deemed to conform to the proof presented at the time of trial.

5. For punitive damages.

6. For such other and further relief as the court deems just and equitable.

Dated this 22nd day of February, 1995.

**MANN & JOHNSON, P.S.**

By /s/ Richard H. Wooster
Richard H. Wooster,
WSBA #13752
Attorney for Plaintiffs

JURY DEMAND

Plaintiff hereby requests that the 42 USC § 1983 claims of plaintiff against Defendants Collins and Riveland be tried to a six (6) person jury.

Dated this 1st day of March, 1995.

**MANN & JOHNSON, P.S.**

By /s/ Richard H. Wooster
Richard H. Wooster,
WSBA #13752
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR COUNTY OF THURSTON

| | |
|---|---|
| TO-RO TRADE SHOWS, d/b/a O'LOUGHLIN TRADE SHOWS,<br><br>Plaintiffs/Appellant,<br><br>v.<br><br>GRANT COLLINS, THE STATE OF WASHINGTON, and ROBERT SMITH, and JOHN DOES 1 through 5,<br><br>Defendants/Respondents. | No. 95-2-03283-1<br><br>**NOTICE OF APPEALS TO COURT OF APPEAL, DIVISION II**<br><br>(Filed Mar. 31, 1998) |

TO-RO TRADE SHOWS d/b/a O'LOUGHLIN TRADE SHOWS, by and through their attorney of record, RICHARD H. WOOSTER, of Mann, Johnson, Wooster & McLaughlin, P.S., seeks review by the designated Appellate Court of the following actions of the Trial Court:

1. 2/21/97 Order dismissing Plaintiff's Claims that the provisions of RCW 47.60.021 and RCW 47.60.023 violate the Commerce Clause based upon lack of standing;

2. 2/21/97 Order finding RCW 47.60.021 and .023 do not violate the first amendment.

3. 3/3/98 Ruling Prohibiting Plaintiff from discussion First Amendment of Freedom of Speech in front of jury; and various rulings made during trial restricting Plaintiff's ability to present evidence and try their case.

4. 3/10/98 Order dismissing Plaintiffs claims;

5. 3/10/98 Order Submitting advisory interrogatories to the jury.

6. Pursuant to RAP 5.3(h) such other aspects of the Courts actions as may be appropriate to include in the appeal by way of an amendment to the notice of appeal such other acts as may be necessary in order to do justice.

Dated this 30th day of March, 1998.

MANN, JOHNSON, WOOSTER
& McLAUGHLIN

/s/ Richard H. Wooster
RICHARD H. WOOSTER,
WSB#13752
Attorney for Plaintiff